Supreme Court, U.S.
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No. 93-64

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al. and Abdul Wahid, et al.,

Petitioners,

against

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether - with all the implications for such important concepts as federalism, comity, abstention, removal/remand issues, federal/state relations and the limited power of the federal judiciary - the Supreme Court should grant certiorari in order to achieve a uniformity of decisions among the courts of appeals by resolving a recently created conflict between the Second and First Circuits, the Second Circuit holding in this case, Bano Bi v. Union Carbide Chemicals, 984 F.2d 582 (2nd Cir. 1993), that, after a case is removed from state to federal court and the federal district court holds there is no subject matter jurisdiction on the ground that the plaintiffs had no "standing" to sue, the federal court should dismiss the

case rather than remanding it to state court, and the First Circuit holding in M.A.I.N. v. Commissioner, Maine Department of Human Services, 876 F.2d 1051 (1st Cir. 1989) that, in the same basic situation, the federal district court should remand rather than dismissing? Involved in this inquiry is the important question of whether, once it is determined in a case removed from state court that the plaintiffs have no standing in the federal court, 28 U.S.C. 1447(c) absolutely mandates remand to state court or whether the district court has the discretion to dismiss, rather than remanding, if it determines that a remand would be futile?

II.

Whether the Supreme Court should grant certiorari in order to resolve an extremely important question of

removal/remand law and in order to achieve a uniformity of decisions among the courts of appeals by resolving conflicts between the Second and Fifth Circuits on the one hand and the Seventh Circuit on the other hand, the Second Circuit in this case and the Fifth Circuit in Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993; split dec.; reh'g and reh'g en banc pending) holding that where a case has been filed in state court and then removed to federal court on the ground that diversity jurisdiction exists, and the plaintiffs timely move to remand the case on the ground that diversity jurisdiction does not exist, the federal district court can address other motions or issues such as the in personam jurisdiction motion and the question of standing, before addressing the remand motion, and the

decision of the Seventh Circuit in Allen V. Ferguson 791 F.2d 611 (7th Cir. 1961), holding that, under the same general circumstances as in Villar and this case, the federal district court should first address the remand motion and if it determines that the removing parties have not met their burden of showing that removal was justified, it should order the case remanded to state court, thus permitting the state court to address such matters as "standing" or "in personam jurisdiction"?

III.

Whether, in a case filed in the state court involving named defendants who would destroy diversity because either they are in-state defendants or they are alien defendants (and alien plaintiffs have been named), and the defendants remove the

case to federal court on the ground that all of the defendants who would destroy diversity have been "fraudulently joined", the Supreme Court should grant certiorari in order to address such important matters as the extent of the removing parties' burden to prove "fraudulent joinder" and whether, in a case such as this one where the defendants failed to clearly show that there was "no possibility" that a state court could have found liability against at least one of the in-state defendants, or in personam jurisdiction against at least one of the alien defendants, the federal district court should have remanded the case to the state court?

IV.

Whether, in a case such as this one, where the plaintiffs have filed suit in the state court and the defendants have

removed the case to federal court by asserting that the federal court had diversity jurisdiction, but, once the case has been removed, the defendants immediately ask the federal court to decline such jurisdiction and dismiss the case on ground of forum non conveniens, the federal district court, if it decides it should decline jurisdiction on such ground, should remand to the state court, rather than dismissing the case? The court, if it grants certiorari on this question, would also be resolving conflicts among the federal courts and other authorities. See Murray vs. Union Pac. Ry. Co., 77 F.Supp. 613 (D.C. Ill. 1948); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); 76 C.J.S. Removal of Cases, Sect. 266; 1A, Moore's Federal Practice, Removal Procedure, Sect.

0.169[1] pp. 684, 685; and the analogous "pendant jurisdiction" cases, e.g. Carnegie-Mellon v. Cohill, 108 S. Ct. 614, 621, 622 (1988) on the one hand, and Nolan v. Boeing, 919 F.2d 1058 (5th Cir. 1990) cert. denied, 111 S.Ct. 1587 (1991); Villar, supra; De Aguilar v. Boeing, 806 F. Supp. 139 (E.D. Tex. 1992) (pending appeal No. 92-5099 in the Fifth Circuit); and this case, on the other hand.

V.

Whether the Supreme Court should grant certiorari in order to resolve the important question of whether or not the offensive collateral estoppel doctrine, established by the Court in Parklane Hosiery Co. Inc. v. Sharp, 99 S. Ct. 645 (1979), applies to two prior orders of remand, which were entered in prior proceedings involving the Bhopal disaster,

the same defendants, the same subject matter on the merits and the same grounds with regard to removal/remand, so as to collaterally estop defendants in this case from opposing plaintiffs' motion to remand, thus requiring remand of this case to the state court of Texas?

VI.

Whether the Supreme Court should grant certiorari to resolve the important issue characterized by the Court of Appeals in this case as follows: "This appeal presents an extraordinary collection of issues, but we have concluded that we need reach only the threshold issue of plaintiffs' standing to dispose of the appeal. That issue is whether plaintiffs have standing to maintain this action in the courts of this country despite the Bhopal Act's

delegation to the Indian Government of the exclusive right to represent those injured in the Bhopal disaster."? The Court of Appeals referred to the issue as "one of first impression".

VII.

Wrapped up in the foregoing issue is the very important question of whether the settlement judgment in India, and the actions of the Indian Government, particularly in acting as the exclusive "representative" of a large class of tort victims, can be collaterally attacked in the American courts on grounds of inadequate notice, inadequate representation, absence of due process, absence of the right to opt-out, collusion, agreeing to a sweetheart settlement that is grossly inadequate, violation of the public policy of this

country or other grounds recognized as a basis for collateral attack with regard to representative proceedings, as expressed in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 2974 (1985); Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L.Ed 22 (1990); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 2152 (1974); and In Re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760, 769, 770 (3rd Cir. 1990), and whether they can be collaterally attacked under the Foreign Money Judgment Recognition Act of Texas, Sect. 36.001-.008 of the Texas Civil Practice and Remedies Code and the principles enunciated in Hilton v. Guyot, 16 S. Ct. 139 (1895).

VIII.

Whether the Supreme Court should

grant certiorari with regard to the forum non conveniens dismissal in order to determine the important question which has long been pretermitted by this Court, see Gulf Oil v. Gilbert, 67 S. Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 262, (1981) - whether, under Erie v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 ALR 1487, the federal court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome? In connection with this issue, the question also arises as to whether certiorari is appropriate in order to achieve a uniformity of decisions among the federal courts by resolving the conflict between the opinion of Judge Learned Hand in Weiss

vs. Routh 149 F.2d 193 (2d Cir. 1945), holding that state forum non conveniens law should be applied by the federal courts under these circumstances, and the decisions of the district court in this case; the Fifth Circuit in In re Aircrash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, reinstated save as to damages under original nom., 883 F.2d 17 (5th Cir. 1989); and the Eleventh Circuit in Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), holding that federal forum non conveniens law should apply under these circumstances.

XI.

Whether the Supreme Court should grant certiorari to resolve the important

question of whether, even if federal forum non conveniens law were deemed to apply, the prior forum non conveniens dismissal under federal forum non conveniens law can be res judicata of the forum non conveniens issue in this case, and whether the district court abused its discretion in granting the forum non conveniens motion, in the face of these undisputed facts:

(a) Since the dismissal in May of 1986 in the first Bhopal case, see In Re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp. 842 (S.D. NY, 1986), aff'd as modified, 809 F.2d 195 (2nd Cir. 1987), cert. denied, 484 U.S. 871 (1987), the Indian Government, despite owning a substantial interest in one of the target defendants, Union Carbide of

India, Ltd. ("UCIL"), arrogated unto itself the alleged "exclusive right" to represent all of the Bhopal victims, without notice to them, without their consent, without their participation and without any right on their part to opt out; that, again without notice to the victims and over their vehement opposition, the Indian Government negotiated a grossly inadequate sweetheart settlement with itself (being both plaintiff and defendant); and, finally, with little fanfare, and again in the face of the vigorous opposition of the victims, the Indian Supreme Court approved such "settlement", even though it was fatally tainted with a pervasive conflict of interest and abuse of

fundamental due process, all of these facts thus compelling the conclusion that India is no longer an adequate alternative forum; and

(b) As to the private interest factors, plaintiffs stipulated that they would, in the American courts, use only American experts who of course would be easily accessible in the American forum; at their expense would bring the trial plaintiffs to the U.S. for depositions, trial and examination by experts of defendants' choice; and would pay the costs of defendants' counsel to go to India and other foreign countries to take the depositions of any relevant witnesses located there; plaintiffs contend that these stipulations, which were not made in the earlier

proceedings, drastically changed the crucial "balance of convenience" factor and that - consistent with this Court's ruling in Piper v. Reyno, supra, holding that defendants' stipulations to appear in the foreign court, etc. should be given weight in the forum non conveniens analysis - plaintiffs' stipulations should have been, but were not, given dispositive effect by the district court in this case.

LIST OF INTERESTED PARTIES

BANO BI, individually and on behalf of the children of Rashid Kahn, and as representative of the Estate of Rashid Kahn;

JAMEELA BI, individually and on behalf of her children and as representative of Estate of her husband, Deceased,

ABDUL SAHAKOOR,
individually and on behalf of Abdul Jahoor, his son,

GOO FRAN, individually and/or by and through his guardian, and as representative of the Estate Abrar Khan;

AJEEJA BI;

MOHAMMAD SAYEED;

SITARA ALI;

GAFFAR ALI;

M.D. SHAFIQ, individually and on behalf of his daughter, Afsan;

SUBER MOHAMMAD, individually and on behalf of his daughter, Shimilah;

MOHAMMAD ILIYAS, individually and on behalf of his daughter, Farhana;

M.D. SHAFIQ, individually and on behalf of his daughter, Shaifta;

SHAHEEN KAHN, daughter of the late Munney

SYED MAKSOOD ALI, son of Sed Imtiyaz Ali, all individually and on behalf of all those similarly situated,

ABDUL WAHID, ET AL;

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Because several thousand plaintiffs are involved in the Wahid case, the Clerk of this Court has granted Petitioners permission to file with the Clerk a 131 page document containing a complete list of the parties to this appeal. Petitioners have filed this document with the Clerk of the Court.

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UNION CARBIDE EASTERN, INC.;

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No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al., and Abdul WAHID, et al.

Petitioners

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Bano Bi et al. and Abdul Wahid, et al. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 26, 1993.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court, dated February 20, 1992, denying the plaintiffs' motion to remand to state court and dismissing this case on ground of forum non conveniens, is attached as Appendix A, A1-23.

2. The opinion of the Court of Appeals, dated January 26, 1993, affirming the judgment of the district court and holding that the motion to remand should be denied and that dismissal was proper on the ground that the plaintiffs had no standing in the federal courts, is attached as Appendix B, A24-46.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered on January 26, 1993. The petition for rehearing and rehearing

en banc was timely filed and overruled on March 26, 1993. App. C, A47, 48. This petition for writ of certiorari has been timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of 28 U.S.C. 1441(a) and 1447(c) of the removal/remand statutes; The Foreign Money Judgment Recognition Act of Texas, Section 36.001 - 36.008 of the Texas Civil Practice and Remedies Code; Section 71.031 of the Texas Civil Practice and Remedies Code; and the Bhopal Gas Leak Disaster (Processing of Claims) Act ("Bhopal Act") of India dated March 29, 1985 (attached App. K, A139 - 156).

STATEMENT OF THE CASE

As the Court of Appeals in this case correctly stated, "(o)n the night of December 2, 1984, the most devastating industrial disaster in history occurred when winds blew deadly gas from a plant operated by Union Carbide India Limited ('UCIL') into densely populated parts of Bhopal, India." A26, 27; Bano Bi v. Union Carbide, 984 F.2d 582, 583 (2nd Cir. 1993). Suits were initially filed in the federal courts and, on January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned some 145 purported class actions filed in the federal district courts across the United States to the Southern District of New York, before Judge Keenan, where they became the subject of a consolidated complaint filed on June 28, 1985 (MDL 626).

On March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act ("the Bhopal Act") purportedly granting to its government ("Indian Government"), the exclusive right to represent the victims of the disaster in India or elsewhere. Pursuant to this authority, on April 8, 1985 the Indian Government, purportedly on behalf of all the victims of the Bhopal disaster, filed a complaint against the Union Carbide companies in the New York federal court and it became a part of MDL 626. In that suit, the Indian government made it clear that it preferred, on behalf of the victims, to have their rights litigated in the American courts because the Indian Government, at least at that time, did not consider India to be an adequate alternative forum for the Bhopal

litigation.

In the meantime, a group of Indian plaintiffs who did not want to be in federal court, and represented by undersigned counsel, filed suit in the state court of Texas. The suit was filed against Union Carbide Corporation ("UCC"), Union Carbide of India Ltd. ("UCIL"), Union Carbide Eastern Inc. ("UCE"), Enserch Corporation ("Enserch"), Humphries and Glasgow Consultants PVT, Ltd. ("H&GC"), Humphries and Glasgow, Ltd. ("H&G"), and Ebasco-Humphries and Glasgow, Inc. ("EH&G"). See Soni et al. v. Union Carbide Corporation, et al., Cause No. B-121, 140, 60th Judicial District Court of Jefferson County, Texas. UCIL, UCE, H&GC and H&G are alien defendants and Enserch and EH&G are in-state defendants, both being domiciled in Texas.

Alleging complete diversity of citizenship and that all of the alien and in-state defendants had been "fraudulently joined", the defendants twice removed the case to federal court. See App. D and E, A49 - 64. After full briefing on the question of fraudulent joinder, the federal district court twice remanded the case to the state court of Texas. See Orders dated February 20, 1984 and June 28, 1985, in Soni v. Union Carbide et al., (E.D. Tex.), Bmnt. Div., Nos. B-85-257-CA and B-85-846-CA respectively, App. F and G, A65 - 68.[1]

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[1] After remand, the Texas state court, acting before the Supreme Court of Texas had decided Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990), erroneously dismissed without prejudice the Soni cases. As discussed below, the Alfaro decision clarified Texas forum non conveniens law and held that a suit filed under the Texas Open Forum Act, Sect. 71.031 of the Texas Civil Practices And Remedies Code, cannot be dismissed on

In the meantime, the MDL action was proceeding in New York. We need not repeat the procedural events that led to the decision of the federal district court in New York to dismiss all of the federal cases on ground of forum non conveniens; those proceedings are adequately described in the court's opinion. In Re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844, 845 (S.D.N.Y. 1986). The plaintiffs appealed and the Court of Appeals affirmed the dismissal. In Re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2nd Cir. 1987) cert. den., 484 U.S. 871 (1987).

It is important to note a few of the excerpts from the Court of Appeals

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ground of forum non conveniens. Both the cases involved in this Petition, Bi and Wahid, were filed under the Texas Open Forum Act.

decision. The Court stated that "(b)asic justice dictates that both sides (of the Bhopal litigation) be treated equally", 809 F.2d at 205; that any judgment obtained in India will not be enforceable if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law", id. at 204; the Court pointed out that UCC had contended in the Court of Appeals that the "Indian courts ... do not observe due process standards that would be required as a matter of course in this country", id. at 204; that it (UCC) would be "seriously prejudice(d) ... if the Union of India (UOI) is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings", id. at 204 and 202;

and, finally, the Court expressly held that:

> "Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country."

809 F.2d at 205. Surely, since the Court of Appeals mandated that "both sides be treated equally", the right quoted above also accrued to the Bhopal victims.

It was undisputed that the Government of India had a substantial ownership interest in UCIL at all material times. 809 F.2d at 197. Despite this fact, in September of 1986 the Indian Government, for reasons not satisfactorily explained, reversed its position with regard to the American action and, allegedly acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants in the District Court of Bhopal,

India. The litigation continued in India for more than two years.

By orders dated February 14 and 15, 1989, the Supreme Court of India approved a settlement of "all litigations, claims, rights and liabilities related to and arising out of the [Bhopal] disaster." Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89, 90. Under the settlement, UCC and UCIL agreed to pay $470 million to the Indian Government purportedly for the benefit of all victims of the Bhopal disaster. Id. at 91. On December 22, 1989, in a related decision, the Court upheld the constitutional validity of the Bhopal Act and confirmed the Indian Government's exclusive authority to compromise all claims arising out of the Bhopal disaster. See Charan Lal Sahu v. Union of India,

1989 [Supplement] S.C.A.L.E. 1.

It is undisputed that the Indian Government, purportedly acting as representative of all of the Bhopal victims in the Indian litigation, never gave any kind of formal notice to any of the victims of the suit it was filing on their behalf; did not allow them to participate in the litigation; did not allow them the right to opt-out of the litigation and pursue their own causes of action; did not give them notice of the settlement negotiations or allow them to participate in such negotiations; and did not give them notice of the proposed settlement, did not give them a court-supervised opportunity to oppose the settlement (such as conducting the equivalent of "fairness hearings"), did not consult with them about the

settlement, and reached an agreement with itself (since it owned over 22% of the defendant UCIL and also purported to act for the plaintiffs) without the knowledge, participation or consent of the victims. See uncontradicted affidavits of Kim Laughlin and Abdul Jabbar Kahn, App. H, I and J, A69 - 138. Indeed, from the moment the grossly inadequate settlement was announced [2], the great majority of the victims have vehemently opposed it. Id.

After this grossly inadequate settlement was reached, two class actions were filed in the Texas state courts in

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[2] The affidavits had attached to them studies showing that a minimum of $1 billion would be needed just for medical care and hard damages (loss of income and property). Even though the settlement was reached in 1989, most of the victims have not received one dime to this date, and the very few who have received some compensation, have been paid only a pittance.

October, 1990, seeking compensation for injuries caused by the Bhopal disaster. In one action, the Wahid action, suit was filed against UCC and UCIL. In the other action, the Bano Bi action, suit was filed against UCC, UCIL, UCE, Enserch, H&GC, H&G and EH&G.

The defendants removed these actions to two Texas district courts in November, 1990. Their removal petitions contained the very same ground - diversity of citizenship and the charge that both of the in-state defendants and all four of the alien defendants had been fraudulently joined - that had been urged by the defendants in the two removals of the Soni cases. In the Bano Bi action, Judge Fisher of the Eastern District of Texas, the same judge who had previously entered the two orders in Soni - without giving

any reasons and without allowing the plaintiffs any opportunity for discovery - quickly dismissed the Enserch, H&GC, H&G and EH&G defendants[3] and then, almost as quickly - but still without permitting any discovery - denied the plaintiffs' motion to remand.[4]

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[3] The basis for such dismissal was a virtually unintelligible "Motion With Respect to Venue and to Dismiss". The motion did not seek dismissal of the alien defendants on ground of absence of in personam jurisdiction but sought dismissal on grounds of forum non conveniens, lack of "standing" and the like. The Enserch defendants did not file any affidavits or other evidence in support of their Motion, except to attach the Bhopal Act of 1985, which was not even attached in admissible form. See Jt. App. 1381-1392 of the Record in the Court of Appeals.

[4] Judge Fisher did not write an opinion or explain his reasons for either the dismissal of the Enserch defendants or the decision to deny remand. To be sure, it would be difficult for any court to find that there is "no possibility" that the plaintiffs could establish a right of recovery against the H&G in-state defendants in the state court in view of the finding by the Court of Appeals in the

The ground for removal of the Wahid action was, again, solely diversity of citizenship, with the conclusory allegation that UCIL had been fraudulently joined. The federal judge in the Wahid case did not act upon plaintiffs' motion to remand prior to both the Bano Bi and Wahid cases being removed to Judge Keenan's court in New York via the J.P.M.D.L.

Upon arrival in Judge Keenan's court, the defendants, in addition to their opposition to the motions to remand in

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first appeal that "60 Indian employees employed by the Bombay engineering firm of Humphreys & Glasgow supervised the design and installation of the Bhopal plant over the period of 1972 to 1980." 809 F.2d at 200. And as to the alien defendants, the only affidavits attached by defendants contained nothing more than conclusory "epithets" and certainly did not "clearly" negate "all possibilities" of establishing liability and/or in personam jurisdiction with respect to all of them.

both Wahid and Bano Bi, filed motions to dismiss on various grounds, including the ground of forum non conveniens. The plaintiffs filed the affidavits of Abdul Jabbar Khan and Kim Laughlin in support of their motion to remand and opposition to defendants' motion to dismiss. The plaintiffs also filed a motion asking Judge Keenan to reconsider the precipitate actions of Judge Fisher in dismissing the Enserch defendants in the Bano Bi case and in denying the motion to remand.

The Kahn and Laughlin affidavits established that India is not now an adequate alternative forum under federal forum non conveniens law and plaintiffs' proffered stipulations had the effect of rendering the U.S. a more convenient and adequate forum than India. See Jt. App. 461-465. The plaintiffs stipulated that

they would: (a) use only American expert witnesses on liability and damages, except for local doctors concerning treatment in India; (b) pay the costs of bringing the plaintiffs to the U.S. for depositions, trial and examination by American doctors and experts of defendants' choice; and (c) pay the costs of counsel for defendants to go to India to take relevant depositions there. Jt. App. 372-373.

On February 18, 1992, Judge Keenan summarily denied the motion to remand without giving any reasons, without discussing any of the removal-remand issues, without alluding to any law or authorities, and without explaining his decision. After stating that he would not rule on the other issues raised in defendants' motion because "(r)uling on

the substantive issues raised in their motion would require the Court to exercise jurisdiction over the actions", he held that he would not apply state forum non conveniens law (strangely without even citing or discussing Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945)); declined to accept the irrefutable fact that India had, by the manner in which the Indian Government had handled the Bhopal case, become an inadequate alternative forum; basically ignored plaintiffs' stipulations; and, essentially basing his decision upon his 1986 decision, again granted dismissal on ground of forum non conveniens. App. A1 - 23.

Despite the fact that forum non conveniens was the only ground relied upon by Judge Keenan for dismissal, the Court of Appeals went off on a different

tangent. It affirmed on the ground that the Bhopal Act had deprived the plaintiffs of any "standing" in the American courts. See A25 - 46 and Bano Bi v. Union Carbide, supra. The Court of Appeals finessed the remand issue by erroneously concluding that a remand would be "futile".

For the reasons stated in the "Questions Presented for Review", Petitioners seek this Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

A. Preliminary Statement.

This is truly a momentous case. It not only involves the last chance for the long-suffering Bhopal victims to secure genuine justice, but it also finds the sacred principle of federalism at a crucial cross-road.

There is almost total anarchy, from a global perspective, when it comes to multi-national corporations. The injustices resulting from this anarchy have been greatly facilitated by a doctrine called forum non conveniens. It is a remarkable doctrine. It judicially enables a defendant to claim with a straight face that it is not convenient for it to be sued in its home country, the country it has chosen for its international base of operations.

The doctrine has come to sanction outcome-determinative, reverse-forum shopping by defendants. Contrary to plaintiffs' forum selection, which aims to force a trial somewhere in this Nation (which is really the only country in the world judicially equipped to handle international cases), the multi-nationals

use the doctrine to force removal to a country where, realistically and for all practical purposes, the litigation never gets off the ground and the multi-nationals escape with far too little, or most often, no liability. See Justice Doggett's concurring opinion in Dow Chemical v. Alfaro, 786 S.W.2d 674, 682-688 (Tex. 1990).

After a number of lower federal courts virtually converted the discretionary doctrine of forum non conveniens into an absolute barrier to litigation in this country by foreign plaintiffs,[5] plaintiffs began filing suit

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[5] This Court has always made it clear that the application of the forum non conveniens doctrine is supposed to be discretionary. Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper v. Reyno, 102 S.Ct. 252, 266 (1981). However, the lower courts subsequently created a chauvinistic exception to this Court's decisions in maritime cases, see Lauritzen

in the courts of states which either

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v. Larsen, 73 S.Ct. 921 (1953), Romero v. International Terminal Operating Co., 79 S.Ct. 486 (1959) and Hellenic Lines Ltd. v. Rhoditis, 90 S.Ct. 1731 (1970), by holding that, even where a vessel flies the American flag (or "flag of convenience") and/or is owned and operated by an American-based company, American law would not apply if the vessel is an offshore drilling vessel and the injured crewperson is a foreigner. Chiazor v. Transworld Drilling Corp., 648 F.2d 1015 (5th Circ. 1981) cert. den. 455 U.S. 1019 (1982); Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983 on reh'g. 710 F.2d 207 (5th Cir. 1983); Phillips v. Amoco Trinidad, 632 F.2d 82 (9th Cir. 1980) cert. den. sub nom, Romily v. Amoco Trinidad, 451 U.S. 920 (1981). Meanwhile, some circuits, notably the Fifth Circuit, took an increasingly hard line toward foreign plaintiffs vis-a-vis the forum non conveniens doctrine, a number of them threatening mandamuses or reversing and rendering in those rare instances when a district court might be brave enough to deny a forum non conveniens motion. See Munusamy v. McClelland Engineering, 579 F. Supp. 149 (E.D. Tex. 1984), mand. threatened in In Re McClelland Engineers, Inc. 742 F.2d 837 (5th Cir. 1984) and forum non conveniens denials reversed and rendered in McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313 (5th Cir. 1986) and De Oliveiro v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983).

greatly restricted or refused to recognize the forum non conveniens doctrine.

In response to this, federal courts, at the behest of the defendants, first tried to utilize injunctions to preclude state court actions. e.g. see Chick Kam Choo v. Exxon Corporation, 817 F.2d 307 (5th Cir. 1987) and Sherrill v. Brinkerhoff, 615 F. Supp. 1021 (N.D. Cal. 1985) rev'd in part, Zipfel v. Halliburton, 832 F.2d 1477 (9th Cir. 1987) cert. den. 486 U.S. 1054 (1988). But this Court quickly and properly disabused the federal lower courts of that approach. Chick Kam Choo v. Exxon Corporation, 486 U.S. 140, 108 S.Ct. 1684 (1988) reversing 817 F.2d 307.

However, the relentless assault upon federalism in the lower courts, rather than abating after Chick Kam Choo, has

intensified. Now the defendants are removing patently unremovable state-filed actions to the federal courts on the most frivolous of grounds. This case is a good example. There are two in-state defendants and four alien defendants, the presence of any one of which prevents complete diversity, the sole ground of removal by the defendants.[6] The defendants have utilized in this case what

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[6] 28 U.S.C. 1441(b) provides that the presence of just one in-state defendant precludes removal. All courts of appeals that have addressed the issue have uniformly held that the presence of one alien defendant (if at least some of the plaintiffs are also aliens) precludes removal on diversity grounds. Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1983) (referred to as "Choo II", the second of three appeals) and Cabalceto v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989). This Court has never directly passed upon these holdings but they are based upon sound grounds, there is no conflict among the courts of appeals and there does not appear to be any reason for this Court to address that issue.

has come to be their rapier of removal, a frivolous charge that all of these six defendants were "fraudulently joined". Although this Court has not recently and comprehensively dealt with the question of "fraudulent joinder", some courts of appeals, notably the Fifth Circuit, at first laid down what we suggest is the proper criteria for dealing with the issue, namely the "no possibility" rule. See discussion infra. But recently, a split panel of the Fifth Circuit, as have the lower courts in this case, completely finessed the "no possibility" rule. See Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993).

Even though the Fifth Circuit had previously strongly proclaimed that, in "fraudulent joinder" removals, the removing parties had the heavy burden of

showing clearly that there was "no possibility" that plaintiffs could establish a cause of action against any one of the in-state or alien defendants,[7] the Panel Majority in Villar affirmed the action of the district court in finessing that burden by going directly to the removing defendants' motions to dismiss all four of the alien defendants on ground of absence of in personam jurisdiction. See 990 F.2d at 1494-1495. This created a gigantic shift in burdens, from the extremely heavy "no possibility" burden on the removing defendants to a preponderance of the evidence or prima facie burden upon the removed plaintiffs.[8]

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[7] See discussion and citations under D. infra.

[8] See Thompson v. Chrysler Motors Corp, 755 F.2d 1162 (5th Cir. 1985) and Cutco Industries v. Naughton, 806 F.2d 361 (2d Cir. 1986), holding that the burden on

The district court, without allowing any discovery to the plaintiffs on the in personam jurisdiction motion,[9] quickly granted that motion first and then denied the plaintiffs' motion to remand. The district court then applied federal, rather than state forum non conveniens law, even though the application of federal law made a difference in the outcome. And, though deciding it would decline to accept federal jurisdiction on forum non conveniens grounds, it refused to order the case remanded to state court

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plaintiffs with regard to the in personam jurisdiction issue is "preponderance of the evidence" if the court conducts an evidentiary hearing and "prima facie case" if no evidentiary hearing is conducted.

[9]The failure of the district court to allow plaintiffs' discovery was the subject of a vigorous dissent by Judge Johnson. See 990 F.2d at 1500-1503.

and instead dismissed the case. These actions were all affirmed by the Panel Majority. Id. Thus, with total disregard for federalism and the Erie doctrine, the Panel Majority in Villar allowed the defendants to brutally strip the plaintiffs of their chosen state forum and law.[10]

What is important insofar as this Petition is concerned, is that what happened in Villar is, as can be seen from the Statement of the Case above, precisely what has happened in this case. Thus, the multi-national corporations based in this country have utilized a new judicial device, a new way around the now-banned use of injunctions, to prevent state courts from entertaining suits by foreign

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[10] Petition for rehearing and petition for rehearing en banc are presently pending in Villar.

plaintiffs against them. Tragically, that device involves an unprecedented expansion of federal judicial power and an unwarranted subversion of federalism, comity, the Erie doctrine and statutory limitations upon the removal jurisdiction of federal courts.[11]

B. **This Court Should, We Respectfully Suggest, Clarify International Primate and Resolve the Conflict Between The Decision of the Court Below In This Case, and the Decision of the First Circuit In M.A.I.N..**

Even if we assume arguendo that the Court of Appeals in this case was correct

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[11] It involves the use of a highly questionable ploy: after removing to federal court on the ostensible ground that the federal court has jurisdiction, these defendants have the audacity to immediately request that same federal court to use federal forum non conveniens law to decline such purported jurisdiction and, instead of the court remanding, as it should, such defendants get it to dismiss the case to the death sentence of a virtually non-existent foreign adjudication.

in holding that plaintiffs had no "standing" to bring suit in the federal court, it should have, in accordance with the decision of the First Circuit in Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dept. of Human Services, 876 F.2d 1051 (1st Cir. 1989) (hereafter "M.A.I.N."), remanded this case to state court instead of dismissing.

In M.A.I.N., the First Circuit expressly held that the lower court's determination that the plaintiffs had no standing was the equivalent of "a determination that the district court lacked subject matter jurisdiction"; that "standing is (a) jurisdictional question"; and that "(h)ence, the literal words of the statute (28 U.S.C. 1447(c)) saying that the case 'shall' (not 'may') be remanded, require the court to remand this

case". 876 F.2d at 1053, 1054; emph. ours. The Court then made a statement that has since been seized upon as implying that there is a "futility exception" to 1447(c):

> "We think, however, that the district court erred in departing from the literal words of § 1447(c), which, on their face, give it no discretion to dismiss rather than remand an action. And, we are unwilling to read such discretion into the statute here because we cannot say with absolute certainty that remand would prove futile. It is conceivable, though unlikely, that M.A.I.N. will succeed in finding a state forum for its claims."

876 F.2d at 1054.

The Second Circuit in this case, after erroneously holding that the plaintiffs had no standing in the federal courts, see discussion under F. below, with little explanation apparently concluded it could avoid remand, despite its holding that plaintiffs had no standing, on the theory that, since "the

Texas courts ... would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless." 984 F.2d at 586, 587. Though the Court of Appeals did not cite M.A.I.N. or this Court's decision in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S.Ct. 1700 (1991) ("International Primate"), we respectfully suggest that this Court may have, by not unequivocally holding that the terms of 28 U.S.C. 1447(c) are mandatatory, given the Second Circuit the thought that it did indeed have the discretion to apply a "futility exception". That misconception may have arisen from this Court's discussion in International Primate of the M.A.I.N. decision. 111 S.Ct. at 1709,

1710.[12]

We therefore urge the Court to grant certiorari in this case in order to clarify the holding in International Primate and to resolve the conflict between M.A.I.N. and this case.[13] For

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[12] After holding that the state-filed case had been improperly removed under 28 U.S.C. 1442(a)(1) and noting that "a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of Sect. 1447(c)", 111 S.Ct. at 1709 (emphasis ours), the Court noted and rejected the removing party's contention that M.A.I.N. represented "authority for a futility exception" but then proceeded to discuss and hold that a remand to state court in International Primate would not be futile. 111 S.Ct. 1709, 1710.

[13] The federal court should not have the discretion, we submit, to utilize a "futility exception" because 1447(c) does not mention a "futility exception" and considerations of federalism, and the rule that the right to removal should be strictly construed, would also seem to militate against it. This Court stated many years ago:

other cases reflecting such confusion and conflict, see Migogna v. Sair Aviation, Inc., 937 F.2d 37, (2nd Cir. 1991) (acknowledging the possibility of a "futility exception" but without holding that one does exist) and Bell v. City of Kellogg, 922 F.2d 1418, 1424, 1425 (9th

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> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

Shamrock Oil & Gas Corp. v. Sheets, 61 S.Ct. 868, 872 (1941).

Cir. 1991) (citing M.A.I.N., the court applied a futility exception).[14]

C. **Wrapped Up In The Foregoing Issue, and Permeating Almost All The Issues in This Petition, Is The Important Issue of Whether, In a Removal Case, The First Motion The District Court Should Address Is Plaintiffs' Remand Motion.**

We have discussed in the Preliminary Statement how it has become a recent trend of the lower courts to finesse the remand motion by considering other motions first.

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[14] Even if a "futility exception" were potentially available, for the reasons discussed in International Primate, including its important statement that "plaintiff's lack of Article III standing would not necessarily defeat its standing in state court", 111 S.Ct. at 1710, and discussed in M.A.I.N., 876 F.2d at 1051, it is clear that the Court of Appeals erred in this case in holding that remand to the state court of Texas would be futile, particularly in view of Texas state law on standing. See Texas Open Courts constitutional provision, art. I, § 13, Texas Constitution, and the deference given it by the Court in Pennzoil v. Texaco, 107 S.Ct. 1519, 1528-1529 (1987) and Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1688-1689 (1988).

With regard to this issue, the courts of appeals are in direct conflict. Along with the district court in this case, the Fifth Circuit, in Walker v. Savell, 335 F.2d 536 (5th Cir. 1964) and Villar, 990 F.2d at 1494-1495, has held that the district court may take up other motions, including in personam jurisdiction dismissal motions, before addressing the motion to remand, while the Seventh Circuit has held just the opposite. Allen v. Ferguson, 791 F.2d 611, 615, 616 (7th Cir. 1986).

The court in Allen stated:

> "(W)hen a suit is removed on the basis of diversity of citizenship, the district court should verify the essence of subject-matter jurisdiction at the outset of the litigation if it appears that complete diversity is lacking."

791 F.2d at 615, 616; emphasis ours.

Noting that "federalism concerns tip

the scales in favor of initially ruling on the motion to remand," the court then held that "the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity." Id. at 615, 616. See also, Buyout v. Auto Club Ins. Assn., 704 F. Supp. 1060 (N.D., Ga., 1989) (citing and adopting Allen v. Ferguson); Armstrong v. Alabama Power Co., 667 F.2d 1385, 1388 (11th Cir., 1982);[15]

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[15] In a very articulate statement of the rationale for the holding in Allen V. Ferguson, the court in Armstrong stated:

> "The answer lies in the nature of removal jurisdiction--which is simply a method of transferring into federal court a state court suit containing a federal jurisdictional ground. It also lies in the balance between federal and state judicial power--a balance that requires the federal courts to give '(d)ue regard for the rightful independence of state governments' and to 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Romero

BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975); and Jones Store Co. v. Hammon, 424 F.Supp. 494, 499 (W.D. Mo. 1977.)

We urge this Court to intervene and resolve the conflict between the Seventh, Second and Fifth Circuits on this important issue and hold clearly and unequivocally that, as held in Allen, a district court must always address the motion to remand first and determine whether it has subject matter jurisdiction. "The first order of

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> v. International Terminal Operating Company, supra, 358 U.S. at 380, 79 S.Ct. at 484, 3 L.Ed.2d at 386. Finally, it preserves the plaintiff's right to choose a state forum. To serve these purposes, the federal courts must carefully scrutinize the bounds of removal jurisdiction, even to the point of apparently impractical detail--for these details in the given case eventually guarantee higher goals in all cases."

667 F.2d at 1388.

business is for the federal court to determine its own jurisdiction". 1A Moore's Federal Practice, §0.129 [1] pp. 678, 679.

D. **The Court Should, We Respectfully Suggest, Intervene By Way of Certiorari In Order To Clarify The Standards and Burdens In Fraudulent Joinder Removals And How Those Standards Should Be Applied In Cases Such As This One.**

The standard and burden in fraudulent joinder removals has been defined in different ways by different courts. The standards and burdens incident to the "no possibility" rule adopted by the Fifth Circuit is well stated in Green v. Amerada Hess Corp. 707 F.2d 201 (5th Cir. 1983):

> "The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. . . . .

> Having assumed that all other facts alleged by the plaintiff in his complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the nonremoving party. Id. at 550. Viewing the state law in its proper perspective, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts."

707 F.2d at 205, 209; emphasis ours. See also East Texas Mack Sales v. Northwest Accept. Corp., 819 F.2d 116 (5th Cir. 1987); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); and Laughlin v. Prudential Ins. Co., 882 F.2d 187 (5th Cir.1989).

This Court has framed the standard in more general terms, stating that a fraudulent joinder must be shown by "facts rightly leading to that conclusion (that

the joinder was fraudulent) apart from the pleader's deductions". Wilson v. Republic Steel, 42 S.Ct. 35 (1921). The Second Circuit has stated that the "proof of fraud must be clear and convincing". Norwalk v. Air-Way Electric Appliance Corp., 87 F.2d 317, 320 (2d Cir. 1937).

In the final analysis, the charge of "fraudulent joinder" is a serious one and should not be tolerated unless the removing party can back it up with virtually conclusive proof. This is why we believe it is in the interest of justice and stare decisis for the Court to grant certiorari and adopt the "no possibility" rule as expressed in the earlier Fifth Circuit decisions in Green, Laughlin and East Texas Mack Sales.

How should that rule be applied in cases such as this one? As explained by

Green, et al, the first thing the district court should have done in this case (both Judge Keenan and Judge Fisher) was to examine Texas law to determine what the "possible" theories were, by which in personam jurisdiction could be asserted over the alien defendants. Within the constitutional limitations set by this Court, see Hall v. Helicopteros Nacional, 104 S.Ct. 1868, 1872 (nte. 3) (1984), the Texas Courts are very liberal.

For example, it is well established that a parent company may maintain the requisite jurisdictional contacts for its subsidiaries and vice versa. Reaul v. Sahara Hotel, 372 F. Supp. 995 (S.D Tex. 1975); Walker v. Walker, 583 F.2d 163, 167 (5th Cir. 1978) and Taca Int'l Airlines v. Rolls Royce of England, 204 N.E.2d 329 (N.Y. App. 1965). And in Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986)

the court laid down several ways in which the parent company's relationship with its subsidiaries could justify the holding that in personam jurisdiction over the parent would constitute in personam jurisdiction over the subsidiary. This occurs through concepts of joint contacts, alter ego, agency and other means. Castleberry described a number of theories for "disregarding the corporate entity" such as where the separate corporate relationship of the subsidiary has been used "to achieve an inequitable result"; "as a mere tool or business conduit" of the parent; as "a sham or to perpetrate a fraud"; where the subsidiary has "inadequate capitalization"; or where there has been a transfer of assets out of the subsidiary after the incident made the basis of the suit has occurred.

Castleberry,[16] 721 S.W.2d at 272; Gentry v. Credit Plan of Houston, 528 S.W.2d 571 (Tex. 1985); and Torregrossa v. Szelc, 603 S.W.2d 803 (Tex. 1980).

As to the agency or quasi-agency theories, there are a number of cases which hold that subsidiaries or related

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[16] Indeed, the Panel Majority in Villar raked plaintiff's counsel over the coals, and even sanctioned him, for relying "on Castleberry, 721 S.W.2d at 270, despite the fact that this case had been legislatively overruled four years earlier." p. 4381, Slip. Op. As authority for that statement, the Panel Majority cited Farr v. Sun World Sav. Assn., 810 F.2d 294 (Tex. App. - El Paso 1991). It is obvious that the Panel Majority did not read this case because if it had it would have read the following: "As can readily be seen, the amendments to Article 2.21A effectively eliminated constructive fraud and the failure to observe corporate formalities and requirements...in connection with contract claims, but left untouched the effect of constructive fraud on tort." 810 S.W. 2d at 296, emphasis ours. Since Villar was indisputably a tort case, the rules announced in Castleberry very much applied to Villar, just as they apply to this case.

parties are subject to the in personam jurisdiction of the forum court because of the presence of a principal, parent or quasi-principal.[17]

In this case, as in Villar, the district courts completely denied the plaintiffs an opportunity to engage in discovery with regard to whether any of the four alien entities fit into the mold

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[17] See Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987) (the contacts of a physician, who was present in the forum, were attributed to a nonresident professional corporation for in personam jurisdiction purposes); Hitt v. Nissan Motor Company, Ltd., 399 F. Supp. 838, 846, 847 (S.D. Fla. 1975); Hargrove v. Fibreboard, 710 F.2d 1154, 1159 (5th Cir. 1983) ("it has long been recognized . . . that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries"); Beecham v. Pippin, 868 S.W.2d 356 (Tex. App.-Austin 1985, nc writ); Reaul v. Sahara Hotel, supra; and Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419 (9th Cir. 1977).

of any of the alter-ego, agency, quasi-agency or joint contact theories for finding in personam jurisdiction over a subsidiary. In doing so, the district court in this case (with the tacit acquiescence of the Second Circuit) and the Panel Majority in Villar have flagrantly challenged what at one time was considered hornbook law - that if a court refuses to allow discovery on motions such as in personam jurisdiction dismissal motions it will be reversed.[18]

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[18] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (n. 13), 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978); Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1248-49 (5th Cir. 1976); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973); Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992); and see the dissent in Villar, 990 F.2d at pp. 1500-1503.

Thus, through a combination of frivolous removals[19] based upon fraudulent joinder, a finesse of the heavy fraudulent joinder burdens upon defendants

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[19] We have already mentioned the finding of the Second Circuit in the first Bhopal appeal that the Humphreys & Glasgow (Enserch) defendants were involved in the construction and maintenance of the Bhopal plant, and how Enserch and EH&G have a strong presence in Texas because they have their home offices there. UCC also has a strong presence in Texas. It has plants and offices in Garland, Seadrift, Houston and a vinyl chloride plant in Texas City; and the MIC produced by UCC (this was the gas which exploded and escaped at Bhopal) is used in the production of pesticides at its Texas City plant.

In view of the strong presence of the Enserch and Union Carbide multi-national parents in Texas, it is clear that the defendants did not meet their heavy burden of clearly negating every "possibility" that a Texas court could find in personam jurisdiction with regard to at least one of the alien defendants or liability against at least one of the in-state defendants. And had plaintiffs been allowed the discovery they were entitled to, plaintiffs could probably have established a right of recovery against the alien and/or in-state defendants by a preponderance of the evidence.

by erroneously deciding other motions first, and the refusal to grant discovery to plaintiffs on those motions, the district courts in this case and in Villar have succeeded in making a mockery of federalism. It appears that this ominous trend - of improperly expanding federal judicial power in removal cases involving foreign plaintiffs - is going to continue unless this Court grants certiorari, as it did in Chick Kam Choo, and imposes its solemn shield against this onslaught against federalism.

E. **Certiorari Should Be Granted To Decide The Question Whether A Federal Court In A Removal Case, Once It Determines That It Is Going to Decline Jurisdiction On Forum Non Conveniens Grounds, Should Remand To State Court Rather Than Dismissing.**

This Court has never decided the above stated issue. There is a general line of authorities holding that, in situations where a removal court decides

it is going to decline jurisdiction on ground of forum non conveniens, it should remand rather than dismiss.

In 76 C.J.S., Removal of Cases, § 266, the rule is well-stated:

> "A cause previously removed from a state court to a federal court should not be dismissed by such court because its jurisdiction is lacking or has ceased to exist; nor should it be dismissed under the doctrine of forum non conveniens, but it should be remanded to the state court . . ."

76 C.J.S. at 1124, emphasis ours. See also Murray v. Union Pac. Ry. Co., 77 F.Supp. 613, 614 (D.C. Ill. 1948); Buroes v. Proctor & Gamble Defense Corp., 172 F.2d 541 (5th Cir. 1949); and Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

Professor Moore explains why the rule applied in Murray and the cases cited above is the only just way to handle a case removed from state court when the

federal court elects not to accept jurisdiction on the basis of the doctrine of forum non conveniens:

> "If the federal court to which the action is removed is not prepared to go forward with the case and there is no convenient federal venue to which the suit can be transferred, then, to our mind, simple justice requires a remand to the state court so that it can go forward with the case or dismiss it, as it sees fit. The doctrine of forum non conveniens is a procedural, not a jurisdictional doctrine; and the federal court should not impose its procedural doctrine upon a plaintiff who did not invoke its jurisdiction, for the purpose of preventing an adjudication in both federal and state forums. The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both state and federal forums."

1A Moore's Federal Practice, Removal Procedure, § 0.169 [1], pp. 684, 685; emphasis ours. [20]

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[20] While, as we noted above, this Court has never addressed the issue, it has decided, in a somewhat analogous situation, that a federal court can remand rather than dismiss, where it declines

In addition to the rulings of the lower courts in this case, there are other decisions which are in conflict with the above authorities and hold that a federal court can dismiss a removed case rather than remanding, even though it has decided to decline jurisdiction on ground of forum non conveniens. See e.g. Nolan v. Boeing, 919 F.2d at 1070, and Villar, 990 F.2d at 1497-1498.

We submit that the Court should grant certiorari and resolve the conflict on this important issue in the manner suggested by Professor Moore.[21]

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discretionary jurisdiction. See Carnegie-Mellon v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (involving pendent jurisdiction situations).

[21] Another important issue ignored by the courts below is whether the remand orders in Soni are entitled to offensive collateral estoppel effect. In Soni, the defendants had a "full and fair opportunity" to litigate the same removal/remand issues that are present in

F. **The Court Should Grant Certiorari With Regard To The Issue The Court of Appeals Deemed Controlling: Whether The Bhopal Act, Purportedly Making The Indian Government The Exclusive Representative of The Bhopal Victims, Deprived The Plaintiffs Of Standing In The Courts Below.**

The burden was upon the defendants to prove that the act of state doctrine[22] or its rationale is applicable to this case. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694-95, 96 S. Ct. 1854, 1861-62 (1976) and Liu v. Republic

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this case and lost. Thus, they should be collaterally estopped to oppose remand in this case. See Parklane Hosiery Co. Inc. v. Shore, 99 S.Ct. 645 (1979).

[22] The Court in W. S. Kirkpatrick v. Environmental Tectonics, 493 U.S. 951, 110 S. Ct. 701, 704 (1990) stated the doctrine applies where "the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

of China, 892 F.2d 1419, 1432 (9th Cir. 1989). The defendants utterly failed to meet their burden in several respects and there are several cases which make it clear that neither the act of state doctrine, nor any similar doctrine, applies in this case. These include Liu, supra; Timberlane Lumber Company v. Bank of AM. M.T. and S.A., 549 F.2d 597, 607-608 (9th Cir. 1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923 (1964); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); Boland v. Bank Sepa-Iran, 614 F.Supp. 1166 (E.D.N.Y. 1985); W.S. Kirkpatrick v. Tectonics, supra; Lamb v. Phillip Morris Inc., 915 F.2d 1024 (6th Cir. 1990); Randall v. Arabian American Oil Co., 778 F.2d 1146 (5th Cir. 1986); Veitz v. Unisys Corp., 676 F.Supp. 99 (E.D. Va. 1987); Richmark Corp. v. Timber Falling Consultants, 959

F.2d 1468 (9th Cir. 1992); Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F.Supp. 1365 (E.D. Ark. 1990); International Association of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) cert. den. 102 S.Ct. 1036 (1982); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965) cert. den. 86 S.Ct. 648 (1966); and Filartiga v. Pena-Irala, 577 F.Supp. 860 (E.D.N.Y., 1984). These cases establish that: First, India was not "acting in the public interest" in its dealings with the Bhopal Act (it was acting in its own interest in view of its substantial ownership in UCIL). [23] Second, the provision of the Bhopal Act that the

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[23] See Liu, 892 F.2d at 1432; Timberlane, 549 F.2d at 607-08; and Dominicus Americana Bohio v. Gulf & Western, 473 F.Supp. 680, 690, 698 (S.D.N.Y. 1979).

alleged exclusive right on the part of the Indian Government to represent the victims applies extraterritorially - i.e. outside of India - cannot have any effect under the act of state doctrine or its rationale. [24] Third, the provision in the Bhopal Act concerning "exclusive representation" is not an "act of state". [25] And, fourth, transactions about which

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[24] See Sabbatino, 376 U.S. at 400-01; Liu, at 1432, 1434; Letelier, 488 F.Supp. at 673. As the court in Boland stated: "The doctrine does not preclude such a judgment when the act in question concerns a thing or interest located beyond the confines of the foreign state's territory. Restatement (Second) of Foreign Relations § 43(1) (1965). ... The determining factor is where the act comes to fruition ... If the act does not come to complete fruition within a foreign state then the Act of State Doctrine will not be applied." 614 F.Supp. at 1173; emphasis ours.

[25] Kirkpatrick, 110 S.Ct. at 705; Lamb, 915 F.2d at 1026-1027; Randall, 778 F.2d at 1150 (law of foreign country cannot unilaterally curtail power of U.S. federal courts to hear dispute even though

there is a reasonable "degree of international concensus" are not subject to the act of state doctrine or its rationale (there is definitely a global concensus with regard to tort law - negligence, proximate cause and damages).[26]

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dispute involves rights fixed by laws of another nation); Veitz, 676 F.Supp at 102 ("Saudi labor law exclusivity provisions do not bar American courts' jurisdiction to hear a matter based upon Saudi labor law benefits"); Faysound, 748 F.Supp. at 1370-74 (foreign judicial judgment in case involving private litigants does not rise to status of act of state); and Richmark, 959 F.2d at 1474-77 (federal district court's discovery orders upheld despite the fact that law of People's Republic of China precluded the requested disclosures).

[26] See Sabbatino, 84 S.Ct. at 940; OPEC, 649 F.2d at 1361; and Liu, 8902 F.2d 1433. Furthermore, when the ultimate event occurs "within the United States" our courts will give effect to acts of state only if "they are consistent with the policies and law of the United States". Liu, 892 F.2d at 1433 and Republic of Iraq, 353 F.2d at 51.

There are other reasons why the act of state doctrine or its rationale do not apply in this case. The Bhopal settlement judgment was the consummating act and collateral attacks upon such foreign judgments are permitted by the Texas Uniform Foreign Money Judgment Act, Sect. 36.001-008 of the Texas Civil Practices and Remedies Code, and by the doctrine enunciated in Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895). The plaintiffs had "standing" to collaterally attack the settlement judgment entered in India, and the acts leading up to it, for absence of due process and/or impartiality, for fraud in the procurement of the judgment and for proceedings that "were repugnant to the public policy of the state (Texas)."

Finally, since the proceedings in India were "representative" proceedings, the plaintiff had standing to collaterally

attack those proceedings, including the purported settlement, on grounds of inadequate notice, inadequate representation, collusion, no right to opt-out, that the settlement was grossly inadequate, the presence of conflicts of interest and other abuses of due process. Phillips Petroleum v. Shutts, 105 S.Ct. 2965, 2974 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-5, 94 S.Ct. 2140, 2151 (1974). Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115 (1940); In re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760, 769-70 (3d Cir. 1990); and Ficalora v. Lockheed California Co., 751 F.2d 995, 996, 997 (9th Cir. 1985).[27]

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[27] There are a number of fact issues incident to the "standing" and "act of state" questions, which mesh with the issues to be tried on the merits of the case; therefore those issues should have been deferred to the trial on the merits

G. **The Court Should Grant Certiorari To At Long Last Resolve the Issue Of Whether Federal or State Forum Non Conveniens Law Applies In a Diversity Case In Federal Court, When The Resolution Of That Issue Makes a Difference In The Outcome.**

As we noted above, this Court has long pretermitted the resolution of the above stated issue. See Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 102 S.Ct. 252, 262 (1981). The reason the Court deferred the issue in Gilbert and Reyno is that there was no difference between federal and state forum non conveniens law in those cases. As we have explained above, there is the difference of life and death[28] between

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rather than the Court of Appeals ordering dismissal. Herbert v. National Academy of Sciences, 974 F.2d 192, 198 (D.C. Cir. 1992).

[28] By "life" we mean that, under Texas forum non conveniens law, the plaintiffs will get a trial on the merits in a Texas Court; by death we mean that, under federal forum non conveniens law,

federal and Texas state forum non conveniens law. See Dow Chemical Co. v. Alfaro, supra, 786 S.W.2d at 678.

In Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945), the Second Circuit, in an opinion by the distinguished Judge Learned Hand, held that a federal court sitting in diversity, after removal from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would be different had the court applied federal forum non conveniens law. 149 F.2d at 195. See also Medow Industries, Inc. v. Kirsch Company, Inc., 356 F. Supp. 52, 55 (S.D. N.Y. 1973).

In two other circuits, the courts have held that a federal court sitting in

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the case will likely be sent off to a foreign jurisdiction, where it will die a slow death.

diversity should apply federal forum non conveniens law. Sibaja v. Dow Chem Co., 757 F.2d 1215 (11th Cir. 1985) and In re Air Crash Near New Orleans, La., 821 F.2d 1147 , 1154 - 1159 (5th Cir. 1987) (en banc). However, neither of those cases involved causes that had been removed from state court, whereas Weiss v. Routh was a removed case.[29]

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[29] The reason the "removal" ingredient provides a more compelling case for application of state forum non conveniens law, as was held in Weiss v. Routh, is that the forum non conveniens doctrine centers upon "choice of forum" by the plaintiffs. See Gulf Oil v. Gilbert, 67 S.Ct. at 843. In this case, as in Weiss, the plaintiffs chose the state forum, not the federal forum. That choice of forum, and the outcome plaintiffs would obtain in the chosen forum, must be honored. That is the essence of the Erie doctrine as Judge Hand recognized in Weiss v. Routh, 149 F.2d at 195. See Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) and Chick Kam Choo, supra 108 S. Ct. at 1684, 1691, holding that the Texas courts are fully capable of resolving the relevant issues, including those relating to forum non conveniens.

In Guaranty Trust Co. v. N.Y., 65 S. Ct. 1464 (1945), this Court held that, "putting to one side abstractions regarding 'substance' and 'procedure'", it would apply the Erie doctrine "with an eye alert to essentials in avoiding disregard of state law in diversity cases in the federal courts" and would apply state law, even if labeled "procedural", if the failure to do so would result in a different "outcome" in the federal court. Id. at 1469-70.

We urge the Court to grant certiorari on this issue in order to resolve the conflicts among the circuit courts and thus maintain uniformity and in order to preserve the integrity of the Erie doctrine and federalism.

H. **Even If Federal Forum Non Conveniens Law Were To Apply, There Are Two Important Considerations The Court Should Review By Way Of Certiorari: Whether, Under The Circumstances of**

This Case, India Is Still An Adequate Alternative Forum And Whether, In View of Plaintiffs' Stipulations, The Balance Of Private Interest Factors Now Compels Denial Of The Forum Non Conveniens Motion.

Since the dismissal by Judge Keenan in 1986, see 634 F. Supp. 843, India has thoroughly demonstrated that it is not an adequate alternative forum. The uncontradicted affidavits of Abdul Kahn and Kim Laughlin outlining the events since then establish that the Indian court system has sanctioned a series of legislative and judicial acts that defy all notions of due process.

If, under all the circumstances of this case - the shocking conflict of interest and the dire consequences that followed - India can still be considered an adequate alternative forum, then, in reality, there is no such thing as an inadequate forum. See Mercier v. Sheraton Intern, Inc., 935

F.2d 419, 425, 426 (1st Cir. 1991) (holding that the defendant as a matter of law failed to meet its burden of establishing that Turkey was an adequate alternative forum).

As to the private interest factors, the plaintiffs' stipulations in this case, which were not before the courts in the earlier Bhopal case, drastically shift the balance of convenience. Most courts, as did the lower courts in this case and the court in Villar, though they hasten to accept stipulations from the defendants, which are designed to make a dismissal palatable, completely ignore the plaintiffs' stipulations. This is erroneous and perhaps a violation of "equal protection."[30]

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[30] For examples of the recognition of stipulations by plaintiffs, see Irish National Insurance Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 92 (2d Cir. 1984)

CONCLUSION and PRAYER

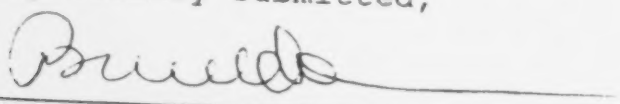
Here we have a constellation of several important questions which, taken together, profoundly affect the very fabric of federalism, comity, removal/remand law, the Erie doctrine and the delicate balance between the state and federal court systems. Therefore, we respectfully pray the Court to grant certiorari upon each and every one of the questions presented.

Dated: Houston, Texas

("... we do not share the district court's concern about the possibility that appellees' counsel might have to fly to Ireland to take testimony, especially since appellant has indicated its willingness to pay the expense of such attendance." 739 F.2d at 92; emphasis ours) and Costa v. Textron, No. CA-4-81-23b (N.D. Tex., 1984) (in Costa the court denied the forum non conveniens motion because of plaintiffs' stipulations.)

July 8, 1993 (as permitted replacement for Petition originally submitted on June 24, 1993)

Respectfully submitted,



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93-64

No. _____

Supreme Court, U.S.
FILED
JUN 24 1993
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al.,

Petitioners

against

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al, Respondents

Abdul WAHID, et al., Petitioners

against

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al., Respondents

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Union Carbide Corporation Gas Plant Disaster

ABDUL WAHID, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

MDL Docket No. 626
OPINION AND ORDER

BANO BI, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

APPEARANCES:

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San Diego, California

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Wayne Walker, Esq.
Houston, Texas

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and Plastics Company

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New York, New York
Of Counsel: Bud G. Holman, Esq.
Jeffrey S. Cook, Esq.
Lisa E. Cleary, Esq.

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Before the Court are motions brought by defendant Union Carbide Chemical and Plastics Company Inc. ("Union Carbide"), formerly known as Union Carbide Corporation. These actions arise out of the tragic industrial accident at Bhopal, India on the night of December 2-3, 1984 in which thousands of people died. Union Carbide moves pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' complaints. Union Carbide moves in the alternative for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment. Plaintiffs move for reconsideration of two rulings by a Texas federal court, one refusing to remand these actions to a state court in Texas, and another dismissing certain defendants.

Plaintiffs initially requested and were granted oral argument. After the Court scheduled oral argument, plaintiffs withdrew their request.

For the reasons discussed below, the Court declines to reach the merits of defendants' motions. Instead, the Court dismisses these actions on the grounds of forum non conveniens. Plaintiffs' motions are denied.

Procedural History

The Bhopal incident has been the subject of previous litigation and decisions by this Court. On May 12, 1986, this court dismissed actions consolidated before it by the United States Judicial Panel on Multidistrict Litigation. That dismissal was based on the doctrine of forum non conveniens. In re Union Carbide Corp. Gas

Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986). In finding that India was a more appropriate forum and deferring to the Indian judicial system, the Court stated that

> [t]he presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding trial in India.
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> . . .
>
> In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. The Court declines to play such a role.

Id. at 866-67.

In 1987, the United States Court of Appeals for the Second Circuit modified and

affirmed this Court's dismissal on forum non conveniens grounds. In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987). In that opinion, the Second Circuit held that

> we are satisfied that there was no abuse of discretion in granting dismissal of the action [on forum non conveniens grounds]. On the contrary, it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal.

Id. at 202.

The United States Supreme Court denied certiorari. Executive Committee Members, et al. v. Union of India and Union Carbide Corp., 484 U.S. 871 (1987).

On March 25, 1985 the Parliament of the Union of India enacted the Bhopal Act. That statute gave the Union of India the exclusive right to represent Indian citizens in connection with claims arising out of the

Bhopal disaster, including the right to commence or settle judicial proceedings. Holman Affidavit, Exhibit L, Bhopal Act at § 3. Based on this authority, the Union of India filed suit against Union Carbide in Bhopal District Court on September 5, 1986.

Litigation continued in India for more than two years. On February 14, 1989, the Supreme Court of India effectuated by Order a settlement of "all litigations, claims, rights, and liabilities related to and arising out of the [Bhopal] disaster." The Terms of Settlement were signed on February 15, 1989 by counsel for Union Carbide and Union Carbide India, Ltd. and by the Advocate on Record for the Union of India. Under the terms of the settlement, Union Carbide and Union Carbide India, Ltd. agreed to pay $470 million to the Registrar of the Supreme Court of India on or before March

23, 1989. On May 4, 1989, the Supreme Court of India set forth the reasons that had persuaded it that the settlement was "just and reasonable". Holman Affidavit, Exhibit T.

On December 22, 1989 the Supreme Court of India upheld that constitutional validity of the Bhopal Act. The Court confirmed the exclusive authority of the Union of India to settle all claims that could be made against Union Carbide or Union Carbide India, Ltd. arising out of the Bhopal disaster. Charan Lal Sahu v. Union of India, 1989 (Suppl.) Scale 1 (Supreme Court of India) at 97, Holman Affidavit Exhibit U.

Plaintiffs filed these actions in Texas state courts in October, 1990.[1] Defendants

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[1] One of the actions, entitled Abdul Wahid, et al. v. Union Carbide Chemicals and Plastics Company, Inc., formerly called the Union Carbide Corporation, and Union Carbide India, Ltd., was filed in the 288th Judicial

removed both of the actions to federal district courts in Texas in November 1990. On January 30, 1991, over the opposition of plaintiffs' attorneys, the United States Judicial Panel on Multidistrict Litigation transferred both actions to the Southern District of New York, where the actions were assigned to this Court.

Discussion

Defendants move pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing plaintiff's complaints on the ground that they fail to state a claim. In the alternative, defendants move pursuant to

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Court of Bexar County, Texas. The second action, entitled Bano Bi, et al. v. Union Carbide Corporation, Union Carbide of India, Ltd., Union Carbide Eastern, Inc., Enserch Corporation, Humphreys & Glasgow Consultants, Ltd., Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc., was filed in the 58th Judicial District Court of Jefferson County, Texas.

Fed. R. Civ. P. 56 for an order granting summary judgment in their favor on the complaints.

Defendants advance several arguments in support of their motion for summary judgment, arguing that such relief is warranted

> on the grounds that: 1) an accord and satisfaction has arisen in law and there has been a compromise, settlement and release of these claims, barring this litigation; 2) under the doctrine of res judicata, plaintiffs are bound by the settlement agreement entered into by the Union of India, Union Carbide, and Union Carbide of India Limited and the subsequent Orders entered by the Supreme Court of India, which settled and disposed of these claims arising from the Bhopal tragedy; 3) under the doctrine of collateral estoppel, plaintiffs are bound by the previous decision of this Court dismissing all actions pending under MDL 626 on the ground of forum non conveniens; 4) plaintiff's claims are barred on statute of limitations grounds; 5) plaintiffs' claims are barred on laches grounds; and

> 6) plaintiffs and their attorneys lack standing and authority to maintain these actions in light of the Supreme Court of India's rulings with respect to the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

Defendant's Notice of Motion at 2.

In opposing defendants' motions, plaintiffs advance a thicket of arguments, some of which would be labeled imaginative by a kind or charitable observer. The Bano Bi plaintiffs argue that the Court should reconsider rulings made by District Judge Joe Fisher of the Eastern District of Texas who dismissed certain defendants and who denied a motion by plaintiff to remand one of the actions to state court. The defendants oppose summary judgment on accord and satisfaction grounds by attacking the fairness, propriety and constitutionality of the Bhopal Act and the settlement between defendants and the Union of India. In

response to defendants' argument that plaintiffs are collaterally estopped from relitigating the issues resolved by this Court's 1986 forum non conveniens dismissal, plaintiffs insist that the Court is bound to apply the forum non conveniens law of the state of Texas.

The Court declines to reach the merits of defendants' motions for dismissal for failure to state a claim for summary judgment. In 1986, the Court declined to exercise jurisdiction, applying the standards and weighing the factors suggested by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 955 (1947), and Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L. Ed.2d 419 (1981). At that time, this Court held clearly that the aftermath of the Bhopal disaster should be resolved in Indian

courts. In 1987, the Court of Appeals for the Second Circuit held not only that this Court had correctly refused to exercise jurisdiction, but added that "it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal." In re Union Carbide Gas Plant Disaster, supra, 809 F.2d at 202. Ruling on the substantive issues raised in these motions would require the Court to exercise jurisdiction over the actions. That course would be inconsistent with the earlier rulings of this Court and of the Second Circuit.

Forum Non Conveniens

Plaintiffs' arguments concerning forum non conveniens are easily disposed of. The Court rejects plaintiffs' argument that Texas forum non conveniens law applies to

this action. Abdul Wahid Memorandum at 6-7; Bano Bi Memorandum at 87-91. As it did in 1986, this Court will apply federal forum non conveniens law to the issue of the convenience of this forum. In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987)(en banc) ("We therefore hold that a federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum"), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, aff'd in relevant part and vacated in part, 883 F.2d 17 (5th Cir. 1989); Rudetsky v. O'Dowd, 660 F. Supp. 341 (E.D.N.Y. 1987)(applying federal forum non conveniens law); Fiorenza v. U.S. Steel Int'l Ltd. 311 F. Supp. 117, 119 (S.D.N.Y. 1969) (forum non conveniens is

a procedural analysis that is governed by federal rather than state law).

Plaintiffs argue that the forum non conveniens analysis in this case must have a different outcome based on what has transpired in the litigation since this Court's dismissal in 1986. The Court will address those arguments below, but notes here that they are all rejected. In 1986, the Court engaged in an exhaustive analysis of the forum non conveniens factors and standards, and applied them to the facts of this case. The Court adopts here the analysis of forum non conveniens in its 1986 opinion. Despite plaintiffs' arguments, both the analysis of the forum non conveniens factors and the result of that analysis are the same today as in 1986. A review of the factors considered by the Court in its 1986 dismissal makes it

apparent that plaintiffs' position is without merit.

Plaintiffs contend that the course of the case in India over the last six years "makes it plain and clear that India is not an adequate alternative forum." Bano Bi Memorandum at 92. They contend that the inadequacy of the Indian forum has been confirmed by the "inadequate" settlement and the allegedly unfair and coercive means by which that settlement was reached. The policies and procedures of the Indian government and judiciary are certainly different from those of American institutions. For substantially the reasons set forth in its 1986 decision, however, the Court concludes once again that India is an adequate forum for this action. In re Union Carbide, supra, 643 F. Supp. 847. The fact that plaintiffs in this action perceive the

settlement to be inadequate does not change the Court's conclusion. The litigation in India, the procedures for notice and the settlement of the case were supervised and administered by the Indian judiciary and Parliament. The constitutionality of the Bhopal Act was upheld by the Supreme Court of India. It is not the role of this Court to conduct appellate review of the acts of the Indian judiciary and Parliament. Cf. In Re Union Carbide, 634 F. Supp. at 867.

The Court also rejects plaintiffs' argument that the result of the forum non conveniens analysis is changed because the plaintiffs are willing to enter into stipulations regarding the use of American expert witnesses, pay the costs of defendants' overseas depositions, and pay for plaintiffs to travel to this country for depositions and medical examinations. Bano

Bi Memorandum at 94. In the Court's view, in spite of those stipulations, the private interest concerns discussed in Gilbert still weigh strongly in favor of dismissal. Those offered stipulations, of course, have no impact upon the Court's 1986 discussion of the public interest factors raised in Gilbert.

Plaintiffs' Motions

On January 2, 1991, after this case was removed from Texas state court, Judge Fisher denied plaintiffs' motion to remand the Bano Bi action to the state court. Holman Affidavit, Ex. I. Plaintiffs now ask this Court to "reconsider" Judge Fisher's order. As this Court stated at a conference with counsel April 8, 1991, the Court declines to modify Judge Fisher's order in any fashion. The Abdul Wahid plaintiffs have also moved

before this Court for remand to state court in Texas. Both of those motions are denied.

Plaintiffs have also moved for reconsideration of Judge Fisher's December 5, 1990 dismissal of Enserch Corporation, Humphreys and Glasgow, Inc., Humphreys & Glasgow, Ltd., and Humphreys & Glasgow Consultants Pvt. Ltd. Those defendants were named in the state court actions. Plaintiffs' motion is denied.

Conclusion

For the reasons discussed above, these actions are dismissed. Plaintiffs' motions are denied. These actions are ordered removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
February 18, 1992

s/
JOHN F. KEENAN
United Stated District Judge

APPENDIX A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Union Carbide Corporation Gas Plant Disaster

MDL Docket No. 626
M 21-38 (JFK)
JUDGMENT

ABDUL WAHID, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

BANO BI, et al.,

Plaintiffs,

-against-

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., formerly called Union Carbide Corporation, et al.,

Defendants.

Defendant Union Carbide Chemical and

Plastics Company Inc. having moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6), F.R.Civ.P., or, in the alternative, for summary judgment, pursuant to Rule 56, F.R.Civ.P., plaintiffs having moved for reconsideration of two rulings by a Texas federal court, one refusing to remand these actions to a state court in Texas, and another dismissing certain defendants, and the said motions having come before the Honorable JOHN F. KEENAN, U.S.D.J., and the Court thereafter on February 13, 1992, having rendered its opinion and order (#69359); denying plaintiffs' motions, and the Court declining to reach the merits of defendants' motions, instead, dismissing these actions on the grounds of forum non conveniens, and removing these actions from the active docket of the Court, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs' motions be and they are hereby denied, and it is further,

ORDERED, that these actions be and they are hereby dismissed on the grounds of forum non conveniens. The Court declines to reach the merits of defendant's motions, for the reasons discussed in the Court's Opinion and Order, dated February 18, 1992, and it is further,

ORDERED, that these actions be and they are hereby removed from the active docket of the Court.

DATED: NEW YORK, NEW YORK
February 23, 1992

s/
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 253, 254 -- August Term 1992

Argued: November 10, 1992
Decided: January 26, 1993

Docket Nos. 92-7325, 92-7327

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BANO BI, INDIVIDUALLY AND ON BEHALF OF THE CHILDREN OF RASHID KAHN, AND AS REPRESENTATIVE OF THE ESTATE OF RASHID KAHN, ET AL.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., ET AL.,
Defendants-Appellants.

- -

ABDUL WAHID, ET AL.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY, INC., ET AL.,
Defendants-Appellees.

- -

Before: NEWMAN, CARDAMONE and MAHONEY,

Circuit Judges.

Appeal from the March 4, 1992, judgment of the United States District Court for the Southern District of New York (John F. Keenan, Judge) dismissing two class action complaints arising from the Bhopal disaster. Affirmed.

Benton Musslewhite, Houston, TX, for plaintiffs-appellants.

Bud G. Holman, New York, N.Y. (Jeffrey S. Cook, Lisa E. Cleary, Kelley Drye & Warren, New York, N.Y., on the brief), for Defendant-appellee Union Carbide Chemicals & Plastics Co. Inc.

(E.R. Norwood, C. Clint Adams, Taylor & Norwood, Liberty, Tex., submitted a brief for defendants-appellees Enserch Corp., Humphreys & Glasgow Consultants Pvt., Ltd., Humphreys & Glasgow, Ltd., & Ebasco-Humphreys & Glasgow, Inc.)

JON O. NEWMAN, Circuit Judge:

This appeal presents an interesting issue of comity among nations in the resolution of claims arising from torts

occurring within a foreign country. The precise issue is whether the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within its borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world. This question arises on an appeal by a class of tort victims from the March 4, 1992, judgment of the District Court for the Southern District of New York (John F. Keenan, Judge) dismissing two complaints on the ground of forum non conveniens. We conclude that the plaintiffs lack standing and on that ground affirm.

Background

On the night of December 2, 1984, the most devastating industrial disaster in

history occurred when winds blew deadly gas from a plant operated by Union Carbide India Limited ("UCIL") into densely populated parts of Bhopal, India. On January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned some 145 purported class actions filed in federal district courts across the United States to the Southern District of New York, where they became the subject of a consolidated complaint filed on June 28, 1985 before Judge Keenan. On March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act ("the Bhopal Act" or "the Act") granting to its government, the Union of India (referred to hereafter as "the Indian Government"), the exclusive right to represent the victims of the disaster in India or elsewhere. Pursuant to this authority, on April 8, 1985, the Indian Government filed a

complaint in the Southern District of New York on behalf of all the victims of the Bhopal disaster. The Indian Government's decision to bring suit in the United States was attributed to the fact that the Indian courts did not have jurisdiction over Union Carbide Corporation ("Union Carbide"),[1] UCIL's parent company.

In a thoroughly reasoned opinion, Judge Keenan granted Union Carbide's motion to dismiss the cases before him on the ground of forum non conveniens over the objections of the Indian Government and the individual plaintiffs. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986). Judge Keenan conditioned his dismissal on, among other things, Union

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[1] Union Carbide has since changed its name to Union Carbide Chemicals and Plastics Company Inc.

Carbide's consent to the jurisdiction of the courts of India. We affirmed the District Court's decision after modifying it in a manner not relevant to the pending appeal. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).

In September 1986, the Indian Government, acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants in the District Court of Bhopal. The litigation continued in India for more than two years. By orders dated February 14 and 15, 1989, the Supreme Court of India approved a settlement of "all litigations, claims, rights and liabilities related to and arising out of the [Bhopal] disaster." Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89, 90.

Under the settlement, Union Carbide and UCIL agreed to pay $470 million to the Indian Government for the benefit of all victims of the Bhopal disaster. See id. at 91. On May 4, 1989, the Supreme Court of India set forth its reasons for concluding that the settlement was just and reasonable. See Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 97. The Court was concerned primarily that the victims of the disaster receive immediate relief. See Id. at 105-06. On December 22, 1989, in a related decision, the Court upheld the constitutional validity of the Bhopal Act and confirmed the Indian Government's exclusive authority to compromise all claims arising out of the Bhopal disaster. See Charan Lal Sahu v. Union of India, 1989 [Supplement] S.C.A.L.E. 1.

After settlement of the Indian lawsuit,

two class actions were filed in Texas state courts in October 1990 seeking compensation for injuries caused by the Bhopal disaster. In one action, Abdul Wahid, as class representative, filed a suit against Union Carbide and UCIL. In the other action, Bano Bi, as class representative, filed a suit against Union Carbide, UCIL, Union Carbide Eastern, Inc., Enserch Corporation, Humphreys & Glasgow Consultants Pvt., Ltd., Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc. These class representatives, appellants on this appeal, contend that their collateral attack on the settlement of their claims by the Indian Government is proper because, among other things, the Indian Government had an unacceptable conflict of interest as part owner of UCIL, most of the victims oppose the settlement as grossly inadequate, and

their due process rights were violated because they received inadequate notice and inadequate representation in the proceedings and because they could not opt out of the settlement.

Appellees removed these actions to two Texas federal district courts in November 1990. In the Bi action, Judge Fisher, of the Eastern District of Texas, dismissed as defendants Enserch Corporation, Humphreys & Glasgow Consultants Pvt., Ltd, Humphreys & Glasgow, Ltd., and Ebasco-Humphreys & Glasgow, Inc. He also denied Bi's motion to remand that action to the Texas state court. On January 30, 1991, the Judicial Panel on Multidistrict Litigation transferred these two actions to the Southern District of New York before Judge Keenan. Judge Keenan refused to reconsider Judge Fisher's rulings and denied Wahid's motion to remand his

action to the Texas state court. Applying federal forum non conveniens law, Judge Keenan dismissed both actions; he held that the analysis and the results of his 1986 opinion were still appropriate.

Discussion

This appeal presents an extraordinary collection of issues, but we have concluded that we need reach only the threshold issue of plaintiffs' standing to dispose of the appeal.[2] That issue is whether the

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[2] Our preference to discuss only the threshold issue of standing will be best understood by identifying the array of complex issues in this case that we need not reach. They are:

1. Whether the claim against the in-state defendants was so spurious on the merits that it was fraudulent for the plaintiffs to join them as defendants?

2. Whether the alien defendants, UCIL, Humphreys & Glasgow Consultants Pvt., Ltd., and Humphreys & Glasgow, Ltd., are amenable to long-arm service in Texas because of their contacts with Texas?

3. Whether the alien defendants were properly joined by asserting jurisdiction over their parent corporations?

4. Whether defendant Union Carbide Eastern, Inc., a Delaware Corporation with its principal place of business in Hong Kong, is considered an alien for purposes of diversity jurisdiction?

5. Whether removal of the state court actions was improper if the in-state defendants were properly joined?

6. Whether removal of the state court actions was improper if aliens were both plaintiffs and defendants?

7. Whether defendant is collaterally estopped to deny that removal was improper because of a remand ruling in a prior District Court suit in Texas?

8. Whether forum non conveniens is a matter of federal or state law?

9. Whether dismissal on forum non conveniens grounds was proper?

10. Whether, if removal was proper and forum non conveniens is a matter of federal law, a federal court, dismissing a suit on forum non conveniens grounds, should remand to state court, or dismiss because the removing parties are entitled to the benefit of the federal court forum non conveniens ruling, despite conflicting state law?

plaintiffs have standing to maintain this action in the courts of this country despite the Bhopal Act's delegation to the Indian Government of the exclusive right to represent those injured in the Bhopal disaster.

India passed the Bhopal Act to "secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitable and to the best advantage of the claimants."

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11. Whether the actions are barred by collateral estoppel arising from our 1987 ruling dismissing the earlier Bhopal action on forum non conveniens grounds?

12. Whether the actions are barred by accord and satisfaction, compromise and settlement, release, res judicata, merger and bar, or statute of limitations defenses?

Though the reader is entitled to wonder if these issues were thought up by a group of professors formulating final exams in federal jurisdiction and civil procedure, they are actually presented in this one appeal.

Preamble to the Bhopal Act. To effectuate the swift and just resolution of claims, section 3 of the Act delegates to the Indian Government "the exclusive right to, represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person." This delegation includes the right to institute or withdraw a suit and to enter into a compromise. Section 3 also provides that, in cases pending as of the effective date of the Act in courts outside of India, the Indian Government would "represent, and act in place of, or along with, such claimant, if such court or other authority to permits." Section 4 of the Act permits individual claimants a limited right to participate in the proceedings. Section

4 states that the Indian Government "shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

The Supreme Court of India, in a lengthy opinion, concluded that the Bhopal Act was constitutional under the Indian Constitution and that the Act violated no principles of natural justice. In so ruling, the Indian Court rejected many of the same arguments that appellants urge in this Court. The Indian Court held that the Indian Government's exclusive representation of all victims in its sovereign capacity would be constitutional as long as the Indian Government assumes the obligation to

pay the victims interim relief or maintenance until monies are realized from Union Carbide, because the Indian Government's exclusive representation deprived the victims of their right to seek immediate relief from Union Carbide themselves. See Charan Lal Sahu, 1989 [Supplement] S.C.A.L.E. at 53-54. The Court excused the Indian Government's failure to give notice of the settlement to each of the several hundred thousand claimants prior to approving the settlement. It reasoned that although the lack of notice may affect the appearance of justice, justice was in fact done because the arguments against settlement were adequately advocated by those who were aware of the settlement and argued against it. See id. at 63-65. In sum, the Court confirmed that as far as Indian law is concerned, the Bhopal Act's

grant of exclusive standing to the Indian Government was proper.

We are faced with what we believe is an issue of first impression. We must decide whether we will give effect to the statute of a foreign government that purports to grant that government exclusive standing to represent the victims of a mass tort that occurred within its borders. India is a democracy. Its Constitution, which took effect in 1950, provides for a republican form of parliamentary government and guarantees the fundamental rights of the people, including equal protection and procedural due process. See Chun-Chi Young, The Legal System of the Republic of India, in 9 Modern Legal Systems Cyclopedia 9.80.1, §§ 1.3(A), 1.3(B)(2)(b) (Kenneth R. Redden & Linda L. Schlueter eds., 1990). Its President is chosen for a five-year term by

an electoral college consisting of the elected members of the Parliament and the state legislatures. See id. at § 1.3(A)(1). The President selects the justices of the Supreme Court and other high courts. See id. The de facto executive is the Prime Minister, who is elected by the parliamentary members of the majority party. See id. The parliament consists of two houses: the Council of States, which consists of state representatives chosen primarily by the state assemblies along with 12 members nominated by the President, and the House of the People, which is directly elected. See id. at § 1.3(A)(2). Judicial independence is a basic principle of India's Constitution. See id. at § 1.3(B)(2)(d). The members of the Supreme Court are guaranteed tenure until age 65 and can be removed only for incompetence or misconduct

by a vote of a majority of all the members of each house and two-thirds of those voting. See id. at § 1.4(A).

India has chosen a system to deal efficiently with a problem of mass proportions that occurred within its borders. It decided in an act passed by its democratic parliament to represent exclusively all the victims in a suit against Union Carbide and to use the money it received in settlement of that suit to fund a plan framed, pursuant to the Bhopal Act, to process the claims of all the victims. Union Carbide's negotiations with the Indian Government were conducted under the assumption that the settlement amount covered all claims. To grant the victims of the Bhopal disaster, most of whom are citizens of India, access to our courts when India has set up what it believes to be the

most effective method of dealing with a difficult problem would frustrate India's efforts.

Under the act of state doctrine, we will not sit in "judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there." See 1 Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987). Although the act of state doctrine is not precisely applicable here, the concerns underlying it support our result. That doctrine has "'constitutional' underpinnings" and "arises out of the basic relationships between branches of government in a system of separation of powers." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). Our Supreme Court was concerned that the Judicial Branch's "passing on the validity

of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." Id. Here too, were we to pass judgment on the validity of India's response to a disaster that occurred within its borders, it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future.

It is not relevant to our determination whether, under our constitutional standards, our Government could pass an act similar to the Bhopal Act. We are deferring to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. Any challenge appellants may have

to the settlement must be made through the legislative or judicial channels that are available in India. We hold that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the foreign government exclusively represents the victims in courts around the world, we will not pass judgment on that determination, and we will permit only the foreign government access to our courts to litigate those claims, subject of course to our own requirements for standing. This conclusion is especially compelling in a case such as this where almost all of the victims are Indian citizens.

Since our resolution of the standing issue permits us to dispose of the appeal, the only remaining issue is whether we should affirm the judgment dismissing the

complaints or remand with directions to remand the suits to the Texas state court. Whether or not a remand would be appropriate if the state court were free to apply its own law of standing, in this case federal law applies. The question whether courts in our federal system must respect an act of a foreign country that purports to deprive the victims of a mass tort of standing to sue in our courts is a question of federal common law binding on state and federal courts alike. The considerations underlying this determination implicate the relationship between our nation and India and are uniquely federal in nature. See Sabbatino, 376 U.S. at 424-25. Furthermore, permitting individual states to develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of

foreign relations. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

Because the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless. We therefore affirm the District Court's judgment of dismissal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of March on [sic] thousand nine hundred and ninety three.

Seal: United States
Court of Appeals
Filed: March 26, 1993

DOCKET NUMBER: 92-7325, 92-7327

BI V UNION CARBIDE CHEMICALS
AND PLASTICS CO.

A petition for rehearing containing a

suggestion that the action be reheard in banc having been filed herein by appellant, Bano Bi, et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ELAINE B. GOLDSMITH, CLERK

By: /s
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

BEAUMONT DIVISION

Civil Action No.

VERIFIED PETITION FOR REMOVAL

Ranesh Chand Soni and Mrs. Ranesh Soni, for themselves and as Guardians and Next Friends of their Minor Children; A.K. Sharma; his mother, Gomti Bai; and his father, G. I. Sharma,	§
All on behalf of themselves and others similarly situated,	§
Plaintiffs,	§
-against-	§
UNION CARBIDE CORPORATION and UNION CARBIDE OF INDIA, LTD.,	§
Defendants.	§

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION:

The petition of defendant UNION CARBIDE CORPORATION ("Union Carbide"), pursuant to 28 U.S.C. §1441 et seq., respectfully shows:

1. Plaintiffs instituted an action against defendants Union Carbide and Union Carbide India Limited ("UCIL") in the District Court of Jefferson County, Texas, entitled Ranesh Chand Soni and Mrs. Ranesh Soni, for themselves and as Guardians and Next Friends of their Minor Children, et al. v. Union Carbide Corporation and Union Carbide of India, Ltd., by filing the Petition on January 3, 1985 and causing the Citation and Petition to be served on Union Carbide on or about January 29, 1985. Upon information and belief, the Citation and Petition have not been served upon UCIL. (A copy of the Citation and Petition are annexed hereto as Exhibit "A" to this Petition for Removal.)

2. The time for Union Carbide to answer or move with respect to the Petition has not expired and no further proceedings have been had herein.

3. The matter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

4. This is a civil action brought in a state court of which the United States District Courts have original jurisdiction under the provisions of 28 U.S.C. §1332 because of diversity of citizenship, and the defendant Union Carbide is not a citizen of the State of Texas, the state in which the action was brought.

5. As set forth in Paragraph I of the Petition, the plaintiffs are citizens of India. In Paragraph II of the Petition, the plaintiffs allege that they are in the process of obtaining appointments of

citizens of Beaumont, Texas to represent the various estates of the decedents and of the minor children involved in this case, and that those persons, in their representative capacities, will be joined as plaintiffs. Upon information and belief, as of the date of this Petition for Removal, plaintiffs have not obtained such appointments of citizens of Beaumont, Texas or joined such persons as plaintiffs.

6. Defendant Union Carbide is now, and was at the time it was served with the Citation and Petition, a corporation organized under the laws of the State of New York with its principal place of business at Old Ridgebury Road, Danbury, Connecticut 06817.

7. Plaintiffs have fraudulently, improperly and in bad faith joined UCIL as a defendant in the complaint in the state

court action, for the sole purpose of attempting to defeat diversity jurisdiction and attempting to prevent removal to this Court, and consequently, the citizenship of UCIL may be disregarded in connection with the diversity jurisdiction of this Court upon removal. Plaintiffs' Petition contains material misrepresentations of fact as to a Texas state court's personal jurisdiction over UCIL, inasmuch as plaintiffs falsely and fraudulently alleged, without there being any basis whatsoever, that UCIL does business in the State of Texas, and that it may therefore be served with process by and through the long-arm statute of the State of Texas, Vernon's Ann. Civ. St. art. 2031(b).

8. UCIL is not licensed as a foreign corporation doing business in Texas, a fact clearly available to plaintiffs upon reasonable inquiry. UCIL does not have and

has never had any manufacturing facilities, offices or other places of business in Texas. UCIL does not have and has never had any sales representatives, agents, officers or employees engaged in business in Texas, and UCIL does not hold and has never held any sales, directors' or other meetings in Texas. In addition, UCIL has never solicited through the mails, or otherwise offered to sell any of its products in Texas, nor has UCIL ever shipped or contracted to ship its products to or through Texas. UCIL has never participated in any negotiations in Texas or with any resident of Texas, for sale of any of its products. UCIL has never recruited in Texas any persons for employment. Because plaintiffs knew or readily could have ascertained that UCIL has done and does no business in the State of Texas, plaintiffs'

allegations of jurisdictional fact as to UCIL are a sham and were asserted falsely, fraudulently, improperly and in bad faith.

9. Plaintiffs' joinder of UCIL on the theory that it is the alter ego of Union Carbide also does not defeat the diversity jurisdiction of this Court. Under their alter ego theory, the plaintiffs treat UCIL not as a separate business entity with Indian citizenship, but rather as a mere conduit of Union Carbide Corporation with citizenship in Connecticut and New York.[1]

10. Thus, this action is a controversy between plaintiffs, citizens or subjects of

---

[1] Defendant Union Carbide does not agree with the plaintiffs' claim that UCIL is the alter ego of Union Carbide, and expressly reserves its rights to litigate that issue at a later date. Nevertheless, plaintiffs' alter ego theory, even if it were true, would not defeat the diversity jurisdiction of this Court.

a foreign state and defendant Union Carbide, which is a citizen of the United States and not a citizen of the State of Texas. Even if plaintiffs do proceed to appoint as representatives and join Texas citizens as plaintiffs, which, upon information and belief, they have not done as of the date of this Petition, the requisite diversity would still exist as between plaintiffs and Union Carbide which is a citizen of Connecticut and New York, but not of Texas.

11. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, as the Petition demands damages in the amount of no loess than Twenty Billion Dollars ($20,000,000,000.00), punitive damages in the amount of no less than Thirty Billion Dollars ($30,000,000,000.00), and additional relief in unspecified amounts.

12. This verified petition is accompanied by a bond with good and sufficient surety, as required by 28, U.S.C. §1446(d), and conditioned that Union Carbide will pay all costs and disbursements incurred by reason of this removal should it be determined that this case was not removable or was improperly removed.

WHEREFORE, Union Carbide Corporation respectfully prays that this cause be removed from the District Court of Jefferson County, Texas, to this Court.

STRONG, PIPKIN, NELSON & BISSELL

By: s/
John G. Bissell
14th Floor, San Jacinto Bldg.
595 Orleans
Beaumont, Texas 77701-3255
(409)835-4581

KELLEY DRYE & WARREN

Bud G. Holman
William A. Krohley
101 Park Avenue
New York, New York 10178
(212)908-1800
Attorneys for Defendant
Union Carbide Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Verified Petition for Removal, Bond for Removal and Notice of Filing of Petition and Bond for Removal has been served upon the following counsel for Plaintiffs by certified mail, return receipt requested this 4th day of February, 1985.

Mr. Benton Musslewhite (NO. P537045969)
609 Fannin Building, Suite 517
Houston, Texas 77002

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. _____

RANESH CHAND SONI, ET AL.	§
	§
VS.	§
	§
UNION CARBIDE CORPORATION, ET AL.	§
	§

PETITION FOR REMOVAL

COME NOW, ENSERCH CORPORATION and EBASCO-HUMPHREYS & GLASGOW, INC., defendants in the above numbered and entitled cause of action, hereinafter called petitioners, and file this their petition for removal, and by such petition would respectfully show the Court the following:

1. The above captioned action is a civil action originally commenced in the 60th Judicial District Court of Jefferson County, Texas, and is now pending in that

Court. Process was served on petitioners on May 7, 1985.

2. The matter in controversy, exclusive of interest or costs, exceeds the jurisdictional minimum of this Court. By their action, plaintiffs seek damages and injunctive relief for alleged personal injuries and property damages allegedly caused by defendants' in connection with the accident at the Bhopal India Plant of Union Carbide of India, Ltd., on or about December 3, 1984.

3. The plaintiffs' claims for relief as stated in their complaint arise under the treaties of the United States within the meaning of 28 U.S.C. § 1441 (b), the removal statute. As appears from plaintiffs' amended petition, attached hereto as Exhibit "A", the plaintiffs base their claims for relief against defendants upon the

allegation that plaintiffs have standing in the Texas State Court. Plaintiffs' alleged causes of action thus depends upon the existence of "equal treaty rights" between the United States and India. The existence of such alleged "equal treaty rights" between the United States and India is a question of federal law over which this Court has original jurisdiction.

4. Petitioners file this petition, duly verified, in this Court within thirty (30) days after petitioners were served with process herein.

5. Petitioners file herewith a bond with good and sufficient surety, as the law directs, for paying the costs and disbursements incurred by reason of these removal proceedings should this Court determine that this action was not removable or was improperly removed to this Court.

WHEREFORE, PETITIONERS PRAY that this action be removed to the United States District Court for the Eastern District of Texas, Beaumont Division.

Dated this 6th day of June, 1985.

Respectfully submitted,

C. Clint Adams
Suite 840, Enserch Center
300 South St. Paul
Dallas, Texas 75201

s/
E. R. Norwood
Bar No. 15113500
340 Main Street
Liberty, Texas 77575
409/336-6408

OF COUNSEL:

TAYLOR & NORWOOD
340 Main Street
Liberty, Texas 77575

ATTORNEYS FOR PETITIONERS
ENSERCH CORPORATION and
EBASCO-HUMPHREYS & GLASGOW,
INC.

THE STATE OF TEXAS §

COUNTY OF LIBERTY §

BEFORE ME, the undersigned authority, on this day personally appeared E. R. Norwood, who being by me duly sworn on his oath deposed and said that he is an attorney for ENSERCH CORPORATION and EBASCO-HUMPHREYS & GLASGOW, INC., is duly qualified and authorized in all respects to make this affidavit; that he has read the above and foregoing Petition for Removal; and that every statement contained therein is true.

s/
E. R. Norwood

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1985, to certify which witness my hand and official seal.

s/
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly served upon the following:

Benton Musslewhite
609 Fannin Building, Suite 517
Houston, Texas 77002

Thomas Henderson
Frick Building, Rm. 1601
Pittsburgh, Pa. 15219

Joseph C. Blanks
1119 First Texas Bldg.

470 Orleans
Beaumont, Texas 77701

Stephen Sheller
1515 Locust
Philadelphia, Pa.

Gene Locks, Esq.
Greitzer & Locks
1500 Walnut Street, 21st Floor
Philadelphia, Pa. 19102

/s
E.R. Norwood

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-85-257-CA

RANESH CHAND SONI, ET AL.	§
	§
VS.	§
	§
UNION CARBIDE CORPORATION AND	§
UNION CARBIDE OF INDIA, LTD.	§

ORDER

CAME ON this day to be heard the Motion of Plaintiffs to Remand and for Sanctions in the above styled cause, and the Court, having considered the motion and the arguments of the parties, is of the opinion that said motion to remand should be granted, and that Plaintiffs' Motion for sanctions should be denied, and it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs' Motion for Sanctions

be and the same is hereby DENIED; and it is

FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs' Motion to Remand be and the same is hereby in all things GRANTED, and the Clerk is directed to remand this cause forthwith to the District Court of Jefferson County, Texas, from which it was removed.

SIGNED AND ENTERED this the 20th day of February, 1985.

s/
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-85-846-CA

RANESH CHAND SONI, ET AL.	§
	§
VS.	§
	§
UNION CARBIDE CORPORATION, ET AL.	§
	§

ORDER

Came on to be heard the Plaintiffs' Motion to Remand this cause to the State Court and for sanctions, and the Court being of the opinion that the Motion to Remand should be granted, but the Motion for Sanctions should be denied, it is, therefore,

ORDERED, ADJUDGED AND DECREED that this cause be, and it is hereby, immediately remanded to the State Court of Jefferson County, Texas.

SIGNED AND ENTERED this 27th day of June, 1985.

s/
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNION OF INDIA

STATE OF MADYHA PRADESH

CITY OF BHOPAL

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared ABDUL JABBAR KHAN, known to me, and after first being sworn, did upon his oath, - state, swear and affirm as follows:

My name is ABDUL JABBAR KHAN. My father's name is Abdul Sattar Khan. I reside in Bhopal, India. My address is 51 Rajendra Nagar, Bhopal 462016. I am 35 years old, of sound mind, and make this sworn statement on the basis of personal knowledge. The statements incorporated in the attached document are true and correct.

SIGNED THIS, the 25th day of September, 1991.

/s _____

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the 25th day of September, 1991.

s/ _____
Notary Public/Commissioner of Oaths
for the State of Madhya Pradesh,
Union of India

UNION OF INDIA
STATE OF MADHYA PRADESH
CITY OF BHOPAL

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared Abdul Jabbar Khan, known to me and, after first being sworn, did upon his oath, state, swear and affirm as follows:

My name is Abdul Jabbar Khan. I reside in Bhopal, India. I am over twenty-one (21) years of age, of sound mind, and make this sworn statement on the basis of personal knowledge. I am the leader of Bhopal Gas Peedit Mahila Udyog Sangathaqn (Bhopal Gas Affected Working Women's Union), the largest organization of gas victims in Bhopal and the only victims' organization which has been continually involved in the legal proceedings.

I have been intimately involved with respect to the claims of victims for damages for death or injury arising out of the Bhopal disaster, which occurred December 2-3, 1984. I am fully familiar with all of the circumstances and events surrounding the efforts of the Bhopal victims, since 1984 to date, to obtain justice for themselves in both the American and Indian courts.

I hereby state, swear and affirm as follows:

1) I am familiar with the first cause of action which was filed on behalf of some of the Indian victims in the United States District Court for the Southern District of New York on December 7, 1984, such action being entitled In Re Union Carbide Corporation Gas Plant Disaster, MDL Docket No. 626. I understand that the Bhopal cases filed in the New York Federal Court remained

pending there up until May 12, 1986, when the Federal District Court dismissed all the cases before it on grounds of forum non conveniens.

2) I am familiar with all the plaintiffs named in the action styled Bano Bi, et al., Plaintiffs v. Union Carbide Corporation et al., Defendants, Civil Action No. 1: 90 CV 883, which is also presently pending in the same U.S. District Court in New York, in which MDL 626 pended. As leader of the Bhopal Gas Peedit Mahila Udyog Sangathan, I work with the Plaintiffs in Bano Bi to employ Mr. Walker and other American counsel and I have discussed with them whether or not they were a part of the original, 1984 action in the New York Federal Court. I can state that to their knowledge, they were not ever listed as a plaintiff in the original action and had not given any American lawyer

actual authority to list them or represent them in the original, 1984 action. Therefore, I can state that they were not an individual or formal party to the Bhopal suit in the Federal Court in New York, at the time this Court dismissed that case on May 12, 1986 on grounds of forum non conveniens.

3> I am also familiar with the proceedings that have been conducted here in India purportedly on behalf of the Bhopal victims. Contrary to Judge Keenan's prediction that the Bhopal case in India would be handled expeditiously and efficiently, the contrary has been true. Suit was filed by the Union of India on behalf of all Indian Bhopal victims on September 5, 1986. It is now September of 1991 and not a cent has been paid to any victim out of the settlement that was allegedly reached on February 14,

1989.

4> Between the time such suit was filed in September of 1986 and the alleged settlement was reached almost three years later, in February 1989, the very things that Professor Marc Galanter had indicated would probably occur in terms of delay, backlog, postponement and deferral, did in fact occur. Because of India's practice of allowing interlocutory appeals on minor subjects and because Union Carbide appealed everything possible in order to delay proceedings, when the alleged settlement was reached in February 1989, the Bhopal case was not anywhere close to being tried. If the phrase "justice delayed is justice denied" ever had any meaning, it has had meaning with respect to the Bhopal litigation in India.

5. Since the settlement was announced, the

vast majority of victims have made it clear that they are completely unhappy with the decision and consider it a product of conspiracy between Union Carbide (UCC) and government officials. Since mid 1989, the Supreme Court of India has been considering appeals by victims seeking to overturn the settlement. The Supreme Court still has not made a final decision. Even if the Supreme Court were to rule on these appeals by the end of the year, I have been told that at least another two years would pass before any distribution would be made to victims. This would be over seven years after suit was originally filed in India by the Union of India and simply goes to show that Professor Galanter was entirely correct in his opinions that endemic delays in the Indian legal system renders India an inadequate alternative forum for handling

the Bhopal litigation.

6. I have been told that Judge Keenan also expressed concern about due process in India and that there was such concern by the American Court of Appeals that it expressly ruled that "(a)ny denial by the Indian Courts of due process can be raised by U.C.C. to the plaintifss' [sic] later attempt to enforce a resulting judgment in this (U.S.A.) country", and also stated that "(b)asic justice dictates that both sides be treated equally." I do hereby state, swear and affirm that the concerns of the Court of Appeals in the United States were well founded and that a rank, egregious and appalling failure of due process has occurred in the Bhopal case in India.

7. Failure of due process has occurred through the triple conflict of interests on the part of the Union of India (UOI). UOI

owns a substantial portion of Union Carbide of India, LTD (UCIL), one of the settling Defendants. UOI also appoints and controls the judges in India and those judges determine the facts as well as the law and therefore constitute the fact-finder in any disputed case. In addition, UOI has had the audacity to arrogate unto itself the right to represent all the potential plaintiffs. So, UOI is in the position of being plaintiff, the defendant and the court. I am sure that a triple conflict of interests of this sort would never be tolerated in any American court.

8. I am also aware of the fact that the Court of Appeals, in strengthening the protections Judge Keenan had given the Union Carbide defendants, expressly acknowledged that a conflict exists where UOI represents both the plaintiffs and one of the co-

defendants, the Court stating:

> UCC contends that Indian courts, while providing an adequate alternative forum, do not observe due procedd [sic] standards that would be required as a matter of course in this country. As evidence of this apprehension, it points to the haste with which the India court in Bhopal issued a temporary order freezing its assets throughout the world and the possibility of serious prejudice to it if the UOI is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings. 809 f.2d [sic] at 204

Again, I state, swear and affirm that the very conflict that concerned the United States Court of Appeals does in fact blatantly exist with regard to the Bhopal litigation in India, and, in fact, the situation is so bad that the plaintiffs have not been able to get a fair trial, fair treatment or the equivalent of due process.

9. As a result of the pervasive conflicts that exist with regard to the Bhopal

litigation in India, a settlement has been contrived by U.C.C. and UOI, the latter acting as both plaintiff and defendant and allegedly "approved" by the court that UOI controls. All this has been done despite the fact that the vast majority of the victims oppose the settlement. I am attaching as Exhibit A a few clippings which demonstrate how the purported "settlement" has generated vehement opposition from victims, involved professionals and the general public. Therefore, it is inconcievabble [sic] to me that plaintiffs named in Bano Bi could in any way, in law, justice or equity, be bound by the "settlement" engineered by UOI, acting as plaintiff, defendant and the court.

10. In connection with the foregoing, I herey [sic] state, swear and affirm that the plaintiffs named in Bano Bi oppose the

purported settlement reached by UOI and none of said plaintiffs have received any compensation out of any "settlement". or [sic] personally executed any kind of release in favor of any of the Union Caride [sic] defendants. As far as all of the plaintiffs in the Bano Bi case are concerned, they have not settled their case with Union Caride [sic] defendants, they do not intend to settle their case on the terms of the alleged "settlement" and they intend to pursue their causes of action in the United States. In this connection, they have employed Wayne Walker and other American attorneys to pursue their cases in the United States; they have agreed to pay him a contingent fee and assinged [sic] to him a portion of their cause of action against UCC and the other defendants. In sum the Bano Bi plaintiffs have never

settled their case with the Union Carbide defendants.

11. I also state, swear and affirm that the plaintiffs named in the Bano Bi case, have not, so far as they know, ever authorized UOI or anyone representing UOI to settle their cases, on their behalf, with the Union Carbide defendants. Therefore, the settlement now relied upon by the Union Carbide defendants in the American courts must be considered to not have been finalized by an "authorized representative" of the Plaintiffs named in Bano Bi.

12. I also state, swear and affirm that the Plaintiffs named in the Bano Bi case had no notice of the purported settlement reacbhed [sic.] by UOI, allegedly on their behalf and were never given, at any time prior to the alleged consummation of the settlement, notice of the fact that, allegedly on thier

[sic] behalf, UOI was attempting to negotiate a settlement. Nor did they have any notice of the terms upon which UOI was allegedly attempting to negotiate the settlement. Furthermore, the Bano Bi plaintiffs were never given the opportunity either individually or through their chosen representatives, to participate in the settlement negotiations. In addition, since the alleged settlement was purportedly reached, the Bano Bi plaintiffs have received no formal notice of the same, have been given no opportunity to appear before the Indian court concerning thier [sic] views on the settlement (I am not speaking here of the Appeal now pending before the Indian Supreme Court, whereby we seek to knock out the entire settlement, but we are talking about a proceeding similar to the "fairness hearing process" required in

American courts with respect to class action settlements); and have not been given the opportunity to express their views to the party who purports to represent them, namely, the Union of India.

13. Therefore, I hereby state, swear and affirm that the Bano Bi Plaintiffs did not have fair notice of the Indian action brought allegedly on their behalf by the Indian Government nor did they have fair notice of the settlement allegedly negotiated on their behalf by UOI. Indeed, the Indian Supreme Court, in a decision to uphold the Bhopal Act, acknowledged that victims had not been given adequate notice.

14. I further state, swear and affirm that UOI did not adequately, fairly or properly represent the Bhopal victims. This is true for several reasons:

a. UOI did not give victims notice,

consult with them, keep them informed or allow them to participate in any way in the Indian legal proceedings.

b. Particularly, UOI did not give victims notice of the settlement negotiations. Terms were decided in the closed chambers of the Chief Justice; victims and the general public were only informed after finalization. Information indicating the basis of the $470,000,000 settlement amount still has not been disclosed; further, no distribution plan has ever been presented.

c. UOI had a profound and shocking conflict of interest all the way through the litigation; UOI owned an interest in one of the defendants, it controlled the courts and also purported to represent the plaintiffs.

d. UOI did not vigorously prosecute the action on behalf of the Plaintiffs but

instead allowed continual delay and was generally dilatory in its representation of the Plaintiffs.

e. There are strong indications that from the time UOI switched its position in the American action, from seeking to have the Bhopal case litigated in the United States to having it litigated in India, it began a course of collusion with its co-defendant UCC and its subsidiaries, all to the severe detriment of the victims, including the Bano Bi Plaintiffs.

f. The settlement that UOI allegedly negotiated on behalf of the Plaintiffs is a disgrace and grossly inadequate. When compared to the total amount required for rehabilitation, it shocks the conscience. To date, more than 11,000 death claims have been filed with full evidence that the deaths were due to gas exposure. More than

4,000 other death claims are pending because survivors do not have medical documentation required by the claims processing authorities. The 1990 annual report of Indian Council of Medical Research (ICMR) records 508,000 injuries sustained by surviving gas victims. Please see Exhibit B for a full survey of ICMR's reports showing the continued morbitity [sic] of gas victims. As this article indicates, rehabilitation costs will far exceed the $470,000,000 amount; adequate health and economic rehabilitation will require in excess of 4 billion dollars.

g. Thus, for all the reasons stated in a-f above, I hereby state, swear and affirm that even in UOI was a legitimate representative of the Bhopal gas victims (which it could not have been due to the conflicts of interests discussed above), it

did not fairly or competently represent the victims in the Indian proceedings. Further, there was a failure of representation regarding the American proceedings when UOI switched positions from one of supporting U.S. jurisdiction to one opposing U.S. jurisdiction.

15. In connection with the claim by the Union Carbide Defendants regarding statute of limitations in the United States, I hereby state, swear and affirm as follows:

a. The suit filed in the United States in December of 1984 contained class action allegations and the federal court in New York at no time prior to the final dismissal of that case, acted upon or denied the class action request. The dismissal of the first action in the New York Federal Court did not become final until October 5, 1987, when the United States Supreme Court

denied petition for writ of certiorari. Meanwhile, a class action was filed in the state court in Beaumont, Texas in 1985 and it remained pending until it was dismissed in late 1988, with such dismissal becoming final in early 1989. Again, the judge in that case did not ever act upon the class action request and no class action was ever denied. I hereby state, swear and affirm that the Plaintiffs in the Bano Bi case relied upon the pendency of those class action proceedings in not filing the Bano Bi suit before October 1990. The Bano Bi Plaintiffs reasonably believed that they did not have to file suit in the United States while any of the class action suits were pending and that they would have two years after all class action suits had been dismissed, in which to file in Texas. I further state that the named Plaintiffs in

the Bano Bi are substantially different from the Plaintiffs named in the 1984 class action filed in New York.

b. As was stated by the Union Carbide lawyers, the Bhopal Act was adopted on March 29, 1985 and it contained some language to the effect that UOI had the "exclusive right to represent and act in place of every person who has made or is entitled to make a claim with respect to the Bhopal disaster. UOI filed suit in the Bhopal District Court on September 5, 1986. At that time, I hereby state, swear and affirm that the plaintiffs listed in the Bano Bi petition reasonably believed that they could not act and were, in effect, enjoined from acting on their own in any other court. In addition, as stated y [sic] the Defendants, the Indian Courts on February 15, 1989 ordered that "(a)ny . . . suits, claims or civil . . .

proceedings filed or to be filed before any court are hereby enjoined and shall not be proceeded with before such court . . . except for dismissal or quashing . . . of this order." Again, I hereby state, swear and affirm that the Bano Bi Plaintiffs reasonably believed that both the 1986 and 1989 orders of the courts in India prohibited them from filing the suit such as the one that has been filed in this, the Bano Bi case.

c. Of the plaintiffs named in the Bano Bi case, those listed on Exhibit "C" attached hereto and incorporated herein by reference were less than twenty years old in October of 1990, when suit was filed in this case in the state court of Texas.

d. I hereby further state, swear and affirm that all of the Plaintiffs named in the Bano Bi case fall in one or more of the

following categories:

i) That he/she or they did not, despite the exercise of due diligence and reasonable care, discover his/her cause or their cause of action or that their illness or injury caused by gas exposure become manifest within two years of the filing of the suit in October of 1990. In this connection, Plaintiffs would show that the Union Carbide people are still denying that the Bhopal gases caused anything more than minor symptoms of acute distress at the time and during the immediate aftermath of the gas leak on December 2-3, 1984. Thereafter, plaintiffs erroneously but reasonably relied upon such statements by UCC and government officials indicating that the Plaintiffs did not have a valid cause of action.

ii) That the Defendants and UOI presented to the Bano Bbi [sic] Plaintiffs,

in various publications and through other official and non-official sources, that victims did not have the right to sue in the United States both because of the Bhopal Act and because of various rulings or legal doctrines in the American Courts. Defendants and UOI further represented that the Bhopal gases did not cause the kinds of injuries and deaths which the Bano Bi Plaintiffs experienced. The Defendants and UOI represented that they would compensate the Plaintiffs for their injuries on a reasonable and fair basis. The Bano Bi Plaintiffs relied upon all these representations in no filing suit in Texas prior to October 1990. Therefore, we believe the Defendants should be equitable estopped from claiming that the statute of limitations bars the Bano Bi suit.

iii) That the Defendants and UOI

fraudulently concealed from the Bano Bi Plaintiffs the true facts about what the Bhopal gases could cause on a long term basis and what kind of medical problems could crop up after substantial latency periods. They also fraudulently concealed the full nature of their collusion and their apparent plan to lead the victims, including the Bano Bi Plaintiffs, into believing that they did not have rights except in the Indian courts and that they could not institute legal proceedings in the United States; pursuant to that plan, they further colluded to force upon the Plaintiffs a grossly inadequate settlement and then used such fraudulent settlement as a means of barring legitimate proceedings in the United States; part of this fraudulent concealment included the concealment of the true nature of the victims causes of action, as well as

the places where they could legitimately bring thier [sic] action; by reason of all the foregoing, the Bano Bi plaintiffs state that the statute of limitations should be tolled to within a short time of the filing of this suit.

16. In summary, I want to comment on the state of affairs in India today. During the past year, the political-economic scene of India has become increasingly chaotic. This situation was clearly exacerbated by the assasination of Rajiv Gandhi and the subsequent instability of Parliament. Further, the return to power of the Congress Party has reestablished the very government which contrived the alleged settlement on behalf of Bhopal victims. For many years, the Congress party has been regarded with suspicion due to rampant corruption and due to their commitment to an economic policy

which caters to the economic interests of industrialists and other elites. This suspicion was given particular example after Rajiv Gandhi's visit to the United States in 1986 and the subsequent switching of UOI's position from support of U.S. jurisdiction to demanding Indian jurisdiction.

All of this may have been made more uncertain by the political instability which now prevails in India. When this overlay of instability and uncertainty is considered with all of the delay, stalling and procedural inadequacies which have now been shown to be the true situation of this case in India, and considered with conflicts of interest and the grossly inadequate representation that UOI has given to the Bhopal victims, and considered with all the other reasons given by Professor Marc Galanter as to why India is an inadequate

forum for a just disposition of the victims' rights in the context of fair due process, I do not see how this Honorable Court or any American court can possibly conclude at the time that the Indian courts constitute a reasonable alternative forum in this case. For the Court's edification, I am attaching, as exhibit "D", a few copies of articles in the press concerning the political instability in India at this time.

SIGNED THIS, the 25th day of September, 1991.

/s _____

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this, the 25th day of September, 1991.

s/
Notary Public/Commissioner of Oaths
for the State of Madhya Pradesh
Union of India

APPENDIX I

Before me, the undersigned authority appeared Kim Laughlin, known to be, and after first being sworn, dead [sic] upon her oath; state, swear and affirm as follows.

My name is Kim Laughlin; I am over the age of twenty-one years; of sound mind, and make this statement on my own free will and state that it is based on personal knowledge.

I am a doctoral candidate at Rice University in the Department of Anthropology. My educational background has prepared me to assess the role of science and technology in society. The subject of my Ph.D. research is the long term social and economic impact of the Bhopal gas disaster of 1984. I resided in Bhopal from

September 1990 through June 1991. During this time I worked directly with the leaders and members of Bhopal Gas Peedit Mahila Udyog Sangathan (Bhopal Gas Affected Working Women's Union) (BGPMUS), the largest victims' organization in Bhopal. I have also worked with leaders of Bhopal Group for Information and Action (BGIA), an organization of educated volunteers who serve as English language representatives of BGPMUS. I also have had numerous discussions with Indian legal experts, political leaders, health professionals, and bureaucrats who have been involved in the Bhopal case. I also have done archival research to analyze documents and other materials generated in the six years since the disaster. The following statements are derived from my research efforts and material:

I. REGARDING THE MOTION TO REMAND BASED ON THE ISSUE OF IMPERSONAM JURISDICTION

A. Union Carbide Corporation (UCC) is the alter ego of Union Carbide India Limited (UCIL). The intimate connection between UCC and UCIL was described by Business India in the following excerpt:

Just how close the relationship between the two companies actually was can be seen from the fact that four senior executives of UCC's regional division, Union Carbide Eastern (UCE), including its chairman, were members of UCIL's board of directors. UCIL's budgets, major capital expenditures, policy decisions and company reports had to be approved by UCC corporate headquarters. The Bhopal plant formed an integral part of UCC's agricultural products division (APD),

and was directly under the control of the director, APD, at the UCE headquarters in Honk [sic] Kong. The director, APD, in turn occupied the position of executive vice president at UCC. Thus the chain of command stretched all the way from Bhopal to corporate headquarters in Danbury, Connecticut. (December 2-15, 1985)

Specifics connecting UCC to the Bhopal subsidiary are as follows:

1. 50.9% of UCIL stock was held by UCC.

2. UCC approved a site choice for the Bhopal plant which situated hazardous production facilities adjacent to already existing residential communities and barely two kilometers from the main railway

station. The Bhopal plant fell out of compliance with city ordinances when, in 1974, it began manufacturing rather than simply formulating pesticides. As the twenty-first-largest company in India and employer of over 10,000 people, UCIL was sufficiently influential to override the city's objections to their location through approval from central and state government authorities.

3. The decision to use and process methyl isocyanate (MIC) in Bhopal was made by UCC. From 1958 to 1973, the end product Sevin was manufactured without using MIC. Carbide switched to MIC dependent method when it became the cheaper alternative. During the first years the Bhopal plant was operating, MIC was imported from the parent company. The decision to build a MIC

processing unit in Bhopal was based on the need to "backward integrate" so that raw materials were produced on site, thus saving transportation costs and exploiting economies of scale. The context of the decision to manufacture MIC domestically was one of increasing competitiveness and industry decline due to local agricultural conditions.

4. The process procedure used to manufacture MIC in Bhopal was an open circuit process chosen, for economic reasons, over the closed circuit process used by Bayer Corporation. Carbide's open circuit process required bulk storage of MIC and thus precipitated the storage management problem which led to the disaster.

5. Design of the UCIL plant and

particularly the MIC unit was carried out and approved by UCC. Significant plant design features approved by UCC include the following:

a. Regulatory and alarm mechanisms at the Bhopal plant were manual and dependent on human detection. At a sister plant in Institute, West Virginia, control systems were automatic and computer monitored.

b. Storage tanks in Bhopal held 40 tons of MIC while Institute had small drum storage. An affidavit on the decision to bulk store was filed in the Federal District Court in Manhattan by Edward Munoz, a retired Vice President of UCC and Managing Director of UCIL during the design of the Bhopal MIC unit. Munoz states that UCIL

personel [sic] preferred a design plan for nominal storage based solely on downstream process requirements. UCC insisted on large-scale storage.

c. The refrigeration unit was too small (30tn) to help control a runaway reaction. Further, a water based brine solution was used as a coolant whereas in Institute a more expensive chloroform cooling system was used. The brine solution could have been a source of water contamination of storage tank contents.

d. In Bhopal, there was no means for continuous check of the purity of MIC. In case of failure in the final refining process, off-grade MIC would be mixed with previously stored material, introducing large scale contamination and danger. In

Institute, interim tanks were provided between the refining system and the storage tank so that newly produced MIC could be checked for purity.

e. The storage tank was pressurized through copper tubing, making it possible for copper filings to be mixed with MIC. Union Carbide information on MIC itself states that copper can cause a dangerously rapid trimerisation, generating sufficient heat to cause a reaction of explosive violence.

f. Vent gas headers were made of carbon steel. In the absence of check valves, back pressure inside the header would push material back into the storage tank, possibly carrying with it rusted coating from the vent header walls. Carbon

causes a catalytic reaction when in contact with MIC.

g. A jumper line modification was made in May 1984 to provide a standby in the event that either the relief valve vent header or the process vent header needed to be shut down for repair. According to the Indian Central Bureau of Investigation inquiry into the disaster, approval for this design modification was given by UCC. The jumper line connected the relief-valve vent header to the process-vent header, allowing water ingress into the MIC storage tank. MIC in reaction with water set off the exothermic process which led to the pressure build up and release of gas into the atmosphere of Bhopal.

h. The vent gas scrubber,

intended to neutralize leaks with a caustic soda solution, was built to handle a maximum pressure of 15psi. The rupture disk channeling gas into the scrubber was set to release at 40psi. Thus, even in circumstances of controlled flow, the scrubber could only accommodate 38% of the gas moving through it.

i. The flare tower, though purportedly part of the MIC safety system, was only designed for slow, steady burn off of carbon monoxide during phosgene (a component of MIC) production.

j. The water sprinkling system could not spray high enough to reach the gas. When the company fire truck arrived on the scene, it, too, was unable to spray water the 120 feet to the top of the vent

gas scrubber, where the gas was gushing out.

6. Maintenance of the UCIL facility was overseen by UCC. This was demonstrated by periodic safety checks by UCC personnel. On at least three occasions, UCC safety auditors recommended the formulation of an evacuation plan for the residential communities adjacent to the plant. UCC was aware these recommendations were never carried out.

7. Quality and quantity of plant personnel was overseen by UCC. Worker manuals were produced in the United States and distributed in English. Senior plant personnel were given training at a sister plant in Institute, West Virginia; 80% of these workers left UCIL in the four years preceding the disaster due to low morale

partially caused by awareness that the Bhopal plant tolerated negligence and lack of safety consciousness. The plant's 1982 operational safety survey documented regular breaches of basic safety rules and warned of the problems which could accompany staff reductions. Please see Appendix 1 for graphs showing staff reductions.

8. UCC financed and managed public relations after the disaster, first by shifting crisis management activities to corporate headquarters in Danbury, Conneticut [sic] and then by hiring Burson Marstellar, one of the largest public relations firms in the world.

9. UCC managed "Operation Faith", the effort to safely neutralize the MIC remaining in storage tanks after the major

leak on 2/3 December.

10. UCC was the defendant in the Indian litigation of the Bhopal case; UCC was the party which negotiated and accepted the February '89 settlement; UCC provided nearly 90% of the $470,000,000 settlement amount to the Indian Reserve Bank (UCIL provided 45,000,000); news of the settlement caused UCC stock to rise $2 a share.

B. Union Carbide India Limited (UCIL) is present in Texas through their relationship with Humphreys and Glascow, a Bombay engineering firm domiciled in Texas under the name of Ensearch [sic]. From the period 1972 to 1980, UCIL supervised 55 to 60 engineers employed by Humphreys and Glascow in detailing summary constructions plans provided by UCC.

C. Ensearch [sic], a defendant in this case domiciled in Texas, is responsible for many of the design decisions which led to the 1984 gas leak. Ensearch [sic] was hired to adapt UCC's "process design package" to the context of the Bhopal facility. Ensearch [sic] was involved in the decisions which led to design and construction much less safe than that in the Union Carbide plant in Institute West Virginia.

II. REGARDING THE MOTION TO DISMISS BASED ON ADEQUATE ALTERNATIVE FORUM AND THE MOTION FOR SUMMARY JUDGMENT BASED ON THE ALLEGED EFFECT OF THE SETTLEMENT NEGOTIATED IN THE INDIAN PROCEEDINGS

A. Since 1985, it has become clear that India cannot provide an alternative adequate forum. The February '89 settlement

preempted a trial on the merits of the case and came about through numerous failures of due process:

1. On March 29, 1985, the Indian Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, granting Union of India (UOI) the exclusive right to represent the victims in India or elsewhere. Thereafter, UOI has represented the Bhopal victims in the capacity of parens patriae. The Bhopal Act itself is a breach of due process because it involves conflicts of interest: while representing the victims, UOI also owns a substantial portion (22%) of UCIL stock and controls the courts, since judges are appointed and there are no juries. Thus, in the Indian proceedings, UOI has been plaintiff, defendant and the court.

The overlapping responsibilities of UOI has precluded the possibility of an impartial tribunal. This structural problem is magnified by the current political-economic environment in India. Since the early eighties, the orientation of Indian development has changed. In the decades following Indian independence in 1947, there as an overt attempt to maintain self-sufficiency through minimalized dependence on foreign investment and technology transfer. This agenda did not provide adequate growth to keep up with the demands of a growing welfare state and increasing national indebtedness. Hence, policy changes in the eighties redirected the economy toward greater utilization of outside resources.

The current dependence of the Indian

economy on foreign investment has undermined the capacity of the Indian State to fairly evaluate the distribution of risks and benefits which accrue through industrial development. Because it is obliged to attract foreign investment, the Indian government is forced to let market considerations override all other concerns. Thus, it is impossible for the Indian government to fairly adjudicate the claims of those victimized by corporations fulfilling investment demands. It is publicly recognized in India that a harsh decision against Carbide would be a deterrent to economic goals. The problem of Third World governments being caught in a double-bind wherein they promote their economies at the cost of safety for their citizens is well recognized in the social science literature.

2. There has been a failure of representation on the part of UOI as parens patriae of the gas victims. This failure is indicated by the paucity of research carried out before arriving at a settlement amount. At the time of the settlement, fewer than 50,000 victims had been assessed for personal injury. The results of this initial assessment were not made public until April 1989, two months after the settlement was finalized.

The great majority of victims contest the adequacy of the settlement because it is insufficient to cover compensation and rehabilitation costs. Approximately 600,000 persons have filed for damages based on physical proximity to the plant. Medical monitoring of the health status of these claimants alone would cost in excess of

$6,000,000. Conservative estimates for full compensation range between one and two billion dollars. Please see Appendix 2 for details. Further, according to the terms of the settlement, the Indian government has first access to reimburse itself for litigation costs, interim relief payments and general economic loss. Government reimbursement alone could easily consume much of the settlement, leaving little for the present and future claims of victims.

Within India, it is not possible to correct the settlement's inadequacies because of UOI's involvement in denial of the magnitude of the disaster. Medical categorization data produced by the Madhya Pradesh State Government and released in 1991 indicates that out of a gas affected population of over half a million people,

only forty individuals are permanently disabled. The release of this data generated disbelief and outrage within the medical community. Doctors affiliated with the organization Socially Active Medicos (SAM) have denounced the data as corruption of scientific means for political ends. They critique the testing protocol for being insufficiently thorough and for blatantly ignoring long term and multisystemic ailments. Please see Appendix 3 for elaboration on problems with medical categorization data now available in India.

Attempts to produce alternative medical documentation through the voluntary sector has led to confiscations and arrests. Officially produced data is not available to interested health professionals. Hence, the research basis for representation of gas

victims in India is unavailable.

3. Victims were given no notice of the settlement prior to it being finalized and publicly announced. Such notice was clearly possible through public news releases or through mailings to victims included on a computerized list used for registering claims. Notice also could have been given through any of the victims organizations in Bhopal. The Supreme Court of India itself recognized this failure of due process during its review of the Bhopal Act. While the Supreme Court upheld the validity of the Bhopal Act, it conceded that victims were not given notice.

Former Chief Justice of the Indian Supreme Court P. N. Bhagwati has critiqued the settlement decision for the following

reasons:

a. The settlement order emerged from appeal arguments and not from proceedings directed toward final judgment. In disposing of the compensation case, Bhagwati argues that the Indian judiciary overstepped accepted principles of jurisprudence.

b. The settlement amount of $470,000,000 was not based on knowledge of rehabilitation costs and "places the value of Indian life at a ridiculously low figure."

c. Settlement offers and counter-offers were not made in open court but in the Chamber of the Chief Justice. In failing to consult or even notify victims,

Bhagwati argues that "the Government forgot that it was not prosecuting a case of its own but was acting as a trustee." (IndiaToday March 15, 1989)

4. The 1989 settlement order did not contain a distribution plan. Such a plan still has not been publicized. Thus, it is not known how much will be allocated to each individual, particularly since the Government has first option to reimburse itself for expenses. Further, the settlement order did not give attention to future claims.

5. Victims have never been given the opportunity to opt out of the February '89 settlement or of the litigation all together. However, sustained protest by victims has clearly indicated opposition.

In a major demonstration protesting the settlement in August 1989, police brutally attacked demonstration participants. This attack is publicly recognized in India as a show of the government's refusal to attend to victims' demands. See Appendix 4 for documentation on victim protest against the settlement.

III. REGARDING THE ISSUE OF RES JUDICATA PER PREVIOUS DISMISSAL ON GROUNDS OF FORUM NON CONVENIENS

A. The present case (Bano Bi, etc.) is a substantially different case from that dismissed from the Federal Court of New York in 1986 on grounds of forum nonconveniens [sic]:

1. The parties listed in the present

case do not know themselves to be listed as plaintiffs in the previous case. The defense's contention that the names listed in this case duplicate those listed in the 1986 proceedings is perhaps grounded on a lack of understanding of Indian culture and language. Indian names are extraordinarily repetitive because specificity is designated by attaching names of extended family members. Further confusion arises from the transliteration of Indian names from Hindi script into the roman alphabet.

2. The parties listed as plaintiffs in this case all have new causes of action. These plaintiffs were selected to fill the following categories: minor children born with birth effects [sic] as a result of their parents exposure, minor children exposed to the gas, survivors of persons who

have died in the last two years, adults who manifested major injury in the last two years, women who have suffered miscarriages or still birth in the last two years.

3. The progress of the case thus far in India has verified that India does not provide an adequate alternative forum. Please refer to Section II, where failures in due process are discussed.

Further, it is clear that Professor Marc Galanter's analysis of the Indian legal system was correct in suggesting that there are structural inadequacies which make due process according to American law almost impossible in Indian courts. These inadequacies include both procedural and substantive aspects:

a. Tort law is not sufficiently developed to deal with highly technical concerns.

b. There are no juries and the courts are not independent of other governing bodies.

c. There is only limited discovery and little infrastructure within legal practice to carry out research.

d. There is not an effective means to circumvent long delays.

Last, it is clear that India has not and cannot provide an adequate alternative forum to the US courts because of UOI's commitment to an economic policy dependent on foreign investment. Please see Section

II.1 for elaboration. A specific and substantive build-up in India's investment dependent agenda occurred this year with the acceptance of an IMF loan. IMF lending comes with austerity requirements that forcibly compels the creation of attractive markets. Social science literature clearly documents the decline of neutral jurisprudence in Third World contexts shaped by external debt obligations.

4. As of this date, there is more evidence that in 1985 to indicate that private interest factors regarding location of witnesses, of major papers, etc. compel the case being handled in the United States. Please refer to Section I for a listing of UCC's involvement in the crucial decisions which led to the disaster.

Further, it is clear that medical categorization data from which a compensation amount could be derived will have to be generated from sources other than those now relied on in India. UOI's categorization data is blatantly unscientific and insufficiently thorough to provide the basis for computing past and expected costs.

5. Contrary to the previous case, the plaintiffs for Bano Bi, etc. stipulate that they will only use American experts on liability, that the plaintiffs will present themselves in the United States for depositions and for examination by defendant's chosen doctors and that they will pay costs for the defense counsel to go to India to take relevant depositions.

IV. REGARDING THE MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATION

a. Statutes of limitation should not bar this case for the following reasons:

1. All representatives for this case either discovered their cause of action or their cause of action arose within the last two years. Please refer to Section III.2 for details.

2. Since the occurrence of the Bhopal disaster in December 1984, there has not been any period of two years in which some form of representative litigation was not underway. Thus, victims assumed that their interests were being continually represented. This assumption was furthered by the victims knowledge that UOI was

representing their interests according to the terms of the Bhopal Act. Until the February 1989 settlement, gas victims had reason to believe that UOI was adequately representing their interests. It was also known that Judge Keenan's 1985 dismissal included a proviso which tolled statutes in the United States until the case was finalized in India. The case remains under review by the Indian Supreme Court.

3. Up through the time of the February 1989 settlement, UCC in concert with UOI has led the plaintiffs to believe that they would take care of damages through provision of compensation, public health care, jobs suited to those with disability and housing. Plaintiffs were thus equitable estopped from initiating alternative litigation.

4. Until January 1990, the survey data produced by the Indian Council of Medical Research was held under the confines of the Official Secrets Act. Also held were individual medical folders showing the results of examinations and laboratory testing. It can thus be said that until January 1990, victims did not discover the extent of their current injury. Since UCC has never admitted medical causation, victims are continually told that their various ailments are not gas related. An example of this is the extraordinary occurrence of tuberculosis in Bhopal. While it is likely that this is related to pulmonary and immune system damage caused by gas exposure, tuberculosis patients are not recorded as MIC patients.

5. Thorough research documenting the

long term effects of MIC exposure has been concealed from victims. Victims thus do not know if their health condition will continue to deteriorate. Academic medical literature has shown that methyl isocyanate causes chromosomal aberration and thus could lead to extraordinary rates of cancer. Health care now available in Bhopal does not include monitoring which could document the onset of long term effects.

CONCLUSION

Evaluation of the Bhopal phenomena has indicated three major points of particular relevance to this litigation:

1) UCC played a controling [sic] role in all UCIL functions. Plant design features which precipitated the disaster were put

forth and finally approved by the parent company. Other significant factors, including site location and personel [sic] reductions, were also approved by UCC.

2) The medical categorization data generated by the Madhya Pradesh State Government is grossly unscientific and unacceptable as a basis for rehabilitation efforts. Controversies over this data has revealed UOI's role in denying the magnitude of compensation requirements both to veil thier [sic] own culpability and to protect broad economic development agendas requiring foreign investment. It has thus become clear that Indian courts, as an arm of UOI, cannot provide an adequate form [sic] to adjudicate the Bhopal case. Conflicts of interest are further complicated by UOI's role as parens patriae representative of the

victims.

3) The settlement amount of $470,000,000 determined in the Indian proceedings is clearly insufficient to compensate and rehabilitate over half a million Bhopal victims. Conservative estimates have costed rehabilitation needs in the range of 2 billion dollars. The "full and final" clause of the settlement is of particular concern due to continued health deterioration and the liklihood [sic] of long term effects.

SIGNED THIS, the 14the [sic] day of August, 1991

s/
Kim Laughlin

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this, the 14th day of August, 1991.

s/
Notary Public, State of Texas

SEAL
ANGELICA JIMENEZ
MY COMMISSION EXPIRES
JUNE 27, 1995

APPENDIX J

BEFORE ME, the undersigned authority, holding the position commensurate with the position of Notary Public in the United States, appeared KIM LAUGHLIN, known to me and after first being sworn, did upon her oath, state swear and affirm as follows:

My name is Kim Laughlin. I am an American citizen; my permanent address is 8 Shadow Lane Houston, Texas 77080. I am in India conducting research sponsored by Rice University. My address while in India is c/o EKlavya, E-1/208 Arera Colony, Bhopal 462016. I am 27 years old, of sound mind and make this sworn statement based on personal knowledge:

> The news articles attached are genuine and are presented to the court to demonstrate gas victim dissent against the terms of the

recent judgement from the Supreme Court of India regarding the February '89 settlement between Union Carbide Corporation and the Government of India. Most significantly, the victims contest the following:

1) The courts have failed to acknowledge the denial of due process involved in failing to obtain victim consent to the terms of the settlement.

2) There has been a failure of representation by the Government of India in arriving at the $470,000,000 settlement amount without substantive basis.

3) A clear distribution plan still has not been made

available. However, it has been indicated that compensation will only be available to the 30,000 individuals categorized as injured by the Madhya Pradesh State Government. Data from Indian Council of Medical Research identifies morbidity in over 500,000 individuals. Thus, the judgement's condition that the Government of India's must make up any lack in the settlement amount does not offer any security to the majority of gas affected people.

SIGNED THIS, THE 9TH DAY OF OCTOBER, 1991.

s/_____

SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS, THE _____ DAY OF OCTOBER, 1991.

s/
Notary Public for the State of Madhya Pradesh, Union of India

APPENDIX K

THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) ACT, 1985

(ACT 21 OF 1985)

(AS PASSED BY THE HOUSES OF PARLIAMENT--

RAJYA SABHA ON 18TH MARCH, 1985

LOK SABHA ON 27TH MARCH, 1985)

ASSENTED TO
on 29 MAR 1985
Act No. 21 of 1985

Bill No. V-F of 1985

THE BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) BILL, 1985

(As Passed by the Houses of Parliament)

A

BILL

to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

Be it enacted by Parliament in the Thirty-sixth Year of the Republic of India as follows:--

Short title and commencement.

1. (*1*) This Act may be called the Bhopal Gas Leak Disaster (Processing of

Claims) Act, 1985.

Definitions.

(2) It shall be deemed to have come into force on the 29th day of February, 1985.

2. In this Act, unless the context otherwise requires,--

(a) "Bhopal gas leak disaster" or "disaster" means the occurrence on the 2nd and 3rd days of December, 1984, which involved the release of highly noxious and abnormally dangerous gas from a plant in Bhopal (being a plant of the Union Carbide India Limited, a subsidiary of the Union Carbide Corporation, U.S.A.) and which resulted in loss of life and damage to property on an extensive scale;

(b) "claim" means--

(i) a claim, arising out of, or connected with, the disaster, for

compensation or damages for any loss of life or personal injury which has been, or is likely to be, suffered;

(ii) a claim, arising out of, or connected with, the disaster, for any damage to property which has been, or is likely to be, sustained;

(iii) a claim for expenses incurred or required to be incurred for containing the disaster or mitigating or otherwise coping with the effects of the disaster;

(iv) any other claim (including any claim by way of loss of business or employment) arising out of, or connected with, the disaster;

(c) "claimant" means a person entitled to make a claim;

(d) "Commissioner" means the Commissioner appointed under section 6;

(e) "person" includes the Government;

(f) "Scheme" means a Scheme framed under section 9.

Explanation--For the purposes of clauses (b) and (c), where the death of a person has taken place as a result of the disaster, the claim for compensation or damages for the death of such person shall be for the benefit of the spouse, children (including a child in the womb) and other heirs of the deceased and they shall be deemed to be the claimants in respect thereof.

Power of Central Government to represent claimants.

3. (*1*) Subject to the other provisions of this Act, the Central Government shall, and shall have the exclusive right to, represent, and act in place of (whether

within or outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the purposes referred to therein include--

(a) institution of any suit or other proceeding in or before any court or other authority (whether within or outside India) or withdrawal of any such suit or other proceeding, and

(b) entering into a compromise.

(3) The provisions of sub-section (1) shall apply also in relation to claims in respect of which suits or other proceedings have been instituted in or before any court or other authority (whether

within or outside India) before the commencement of this Act:

Provided that in the case of any such suit or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court or other authority outside India, the Central Government shall represent, and act in place of, or along with, such claimant, if such court or other authority so permits.

Claimant's right to be represented by a legal practitioner.

4. Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have due regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a

legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim.

Power of the Central Government.

5. (*1*) For the purpose of discharging its functions under this Act, the Central Government shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely:--

(*a*) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(*b*) requiring the discovery and production of any document;

(*c*) receiving evidence on affidavits;

(*d*) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which the Central Government may, by notification in the Official Gazette, specify.

(2) Every notification made under clause (f) of sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be made, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be;

so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Commissioner and other officers and employees.

6. (*1*) For the purpose of assisting it in discharging its functions under this Act, the Central Government may appoint an officer, to be known as the Commissioner for the welfare of the victims of the Bhopal gas leak disaster, and such other officers and employees to assist him as that Government may deem fit.

(*2*) The Commissioner shall discharge such functions as may be assigned to him by the Scheme.

(*3*) The Commissioner and such of the officers subordinate to him as may be authorised by the Central Government by

notification in the Official Gazette in this behalf may, for the discharge of their functions under the Scheme, exercise all or any of the powers which the Central Government may exercise under section 5.

(4) All officers and authorities of the Government shall act in aid of the Commissioner.

Power to delegate.

7. The Central Government may, by notification in the Official Gazette, delegate, subject to such conditions and limitations as may be specified in the notification, all or any of its powers under this Act (excepting the power under section 9 to frame a Scheme) to the Government of Madhya Pradesh or an officer of the Central Government not below the rank of a Joint Secretary to that Government or an officer of the Government of Madhya Pradesh not

below the rank of a Secretary to that Government.

Limitation.

8. (*1*) In computing, under the Limitation Act, 1963 or any other law for the time being in force, the period of limitation for the purpose of instituting a suit or other proceeding for the enforcement of a claim, any period after the date on which such claim is registered under, and in accordance with, the provisions of the Scheme shall be excluded.

(*2*) Nothing in sub-section (*1*) shall apply to any proceedings by way of appeal.

Power to frame a Scheme.

9. (*1*) The Central Government shall, for carrying into effect the purposes of this Act, frame by notification in the Official Gazette a Scheme as soon as may be after the commencement of this Act.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), a Scheme may provide for all or any of the following matters, namely:--

(a) the registration of the claims under the Scheme and all matters connected with such registration;

(b) the processing of the claims for securing their enforcement and matters connected therewith;

(c) the maintenance of records and registers in respect of the claims;

(d) the creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of this Act;

(e) the amounts which the Central Government may, after due appropriation made by Parliament by law in that behalf, credit

to the fund referred to in clause (*d*) and any other amounts which may be credited to such fund;

(*f*) the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims;

(*g*) the officer (being a judicial officer of a rank not lower than that of a District Judge) who may make such disbursal or apportionment in the event of a dispute;

(*h*) the maintenance and audit of accounts with respect to the amounts referred to in clauses (*e*) and (*f*);

(*i*) the functions of the Commissioner and other officers and employees appointed under section 6.

(*3*) Every Scheme framed under sub-section (*1*) shall be laid, as soon as may be after it is framed, before each House of

Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the Scheme or both Houses agree that the Scheme should not be framed, the Scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Scheme.

Removal of doubts.

10. For the removal of doubts, it is hereby declared that--

(*a*) any sums paid by the Government to a claimant otherwise than by

way of disbursal of the compensation or damages received as a result of the adjudication or settlement of his claim by a court or other authority, shall be deemed to be without prejudice to the adjudication or settlement by such court or other authority of his claim to receive compensation or damages in satisfaction of his claim and shall not be taken into account by such court or other authority in determining the amount of compensation or damages to which he may be entitled in satisfaction of his claim;

(*b*) in disbursing under the Scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by

the Government before the disbursal of such amount.

Overriding effect.

11. The provisions of this Act and of any Scheme framed thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

Repeal and saving.

12. (*1*) The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, 1985, is hereby repealed.

(*2*) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

A

BILL

to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

(As passed by the Houses of Parliament)

(3)

Supreme Court, U.S.
FILED
AUG 11 1993
OFFICE OF THE CLERK

No. 93-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANO BI, individually and on behalf of the children of Rashid Kahn, and as representative of the Estate of Rashid Kahn, et al.,
Petitioners,

vs.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.; UNION CARBIDE EASTERN, INC.; ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS PVT., LTD.; HUMPHREYS & GLASGOW, LTD.; EBASCO-HUMPHREYS & GLASGOW, INC.,
Respondents.

ABDUL WAHID, et al.,
Petitioners,

vs.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC.'S BRIEF IN OPPOSITION

BUD G. HOLMAN*
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BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals correctly ruled, pursuant to comity principles that govern the relationships among nations, that the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within that foreign government's own borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world?

2. Whether the Second Circuit Court of Appeals should have affirmed the judgment of the Honorable John F. Keenan dismissing the complaints or

remanded to the District Court with directions to remand the suits to the Texas state court where such an act would have been futile?

CORPORATE DISCLOSURE STATEMENT

Union Carbide Chemicals and Plastics Company Inc.'s ("Union Carbide") parent company is Union Carbide Corporation. Union Carbide Chemicals and Plastics Company Inc. (or corporations in which Union Carbide Chemicals and Plastics Company Inc. has an ownership interest) has less than 100% ownership interests in the following subsidiaries and affiliates that have issued shares to the public:

Name

GenEx

UCAR Emulsion Systems

Union Carbide Industrial Gases Inc.

UCAR Polimero y Quimicos C.A.

UCIA Argentina S.A.I.C.S.

UCIA Chile

UCIA Costa Rica

UCIA Peru

Union Carbide Canada Ltd.
Carbon Products

Union Carbide Commercial C.A.

Union Carbide France S.A.

Union Carbide Hellas S.A.

Union Carbide India Ltd.

Union Carbide Indonesia PT

Union Carbide InterAmerica

Union Italia S.p.A.

Union Carbide Korea Ltd.

Union Carbide Malaysia
Sdn. Bhd.

Union Carbide Navarra S.A.

Union Carbide Philippines Inc.

Union Carbide Singapore

Unisil S.p.A.

S.A. White Marlins

Union Carbide Chemicals & Plastics Company Inc. Joint Venture

Baker Cummins Dermatologicals Inc.

Union Carbide Corporation Joint Venture

UCAR Carbon Company Inc.

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COUNTERSTATEMENT OF THE CASE

1. The Nature of These Consolidated Cases

These are two tag-along actions to the 1984 MDL 626 Litigation ("MDL 626") previously consolidated for pre-trial proceedings before the District Court for the Southern District of New York. All of those actions, some 145 in number, were dismissed seven years ago on forum non conveniens grounds. See In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987). As in MDL 626, the petitioners herein seek recovery for personal injuries, wrongful death and loss of property arising from the gas release from the Union Carbide India Limited ("UCIL") plant in Bhopal, India on the

night of December 2-3, 1984. (JA6746-47).[1]

This was not the first time the named plaintiffs in these actions had been before the District Court, seeking the same relief against, inter alia, Union Carbide. Petitioners have not disputed Union Carbide's contention below that they are the same plaintiffs who were previously before the District Court. (JA6745-46, 6070-6133).

2. The Course of Proceedings at the District Court Level

The first of the actions, short captioned Wahid v. Union Carbide (the "Wahid action"), was filed on October

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[1] References to "JA__" refer to designated pages of the Joint Appendix filed with the Second Circuit Court of Appeals, references to "A__" refer to designated pages of the Appendix filed with this Court, and references to "P__" refer to the Petition.

15, 1990, in Bexar County, Texas. (JA6745). The second action, short captioned Bi v. Union Carbide (the "Bi action"), was originally filed on October 19, 1990 in Jefferson County, Texas. (JA6746).

a. Petitioners' Repeated Request for Reconsideration of Their Remand Motion

Union Carbide has always contended that UCIL, Union Carbide Eastern, Inc. ("UCE") and the Enserch defendants[2] were fraudulently joined in order to defeat diversity and removal

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[2] The "Enserch defendants" include Enserch Corporation ("Enserch"), Ebasco-Humphreys & Glasgow, Inc. ("H&G-Texas"), Humphreys & Glasgow, Ltd. ("H&G-London"), and Humphreys & Glasgow Consultants, Pvt., Ltd. ("H&G-India") (collectively "Enserch defendants"). These four defendants were fraudulently joined by plaintiffs in the Bi action for the purpose of defeating the District Court's diversity and removal jurisdiction.

jurisdiction. Accordingly, on November 13, 1990, Union Carbide removed the Wahid and Bi actions to federal court. (JA6745-46).

By Orders dated December 5 and 7, 1990, Judge Joe J. Fisher dismissed the Enserch defendants from the Bi action. (JA6579-80, 6749). On December 7, 1990, plaintiffs moved to remand the Bi case. After full briefing and a January 2, 1991 hearing, Judge Fisher issued an Order denying remand (JA6749), and at the hearing, orally denied the Bi plaintiffs' motion for a new trial, reconsideration and reinstatement of these dismissals. (JA6749).

On January 30, 1991, the Judicial Panel on Multi-District Litigation issued an Order transferring the actions to the Southern District of New

York for pre-trial proceedings, and they were thereafter assigned to Judge Keenan. (JA6749). The Bi plaintiffs subsequently moved the District Court to reconsider Judge Fisher's dismissal of certain defendants and his denial of their remand motion. (JA6750). During an April 8, 1991 status conference, the District Court stated that it would not re-visit the remand issue. (JA6750).

Despite this oral order, the Bi plaintiffs attempted to resurrect the remand issue for the fourth time in their response to Union Carbide's motion to dismiss. The Bi plaintiffs cross-moved to remand and to "reconsider" Judge Fisher's Orders of dismissal of the Enserch defendants. (JA255-410).

Plaintiffs in Wahid had similarly moved to remand their action on

December 19, 1990.[3] That motion was fully briefed, but was not decided prior to the transfer of that action. (JA6749).

On June 20, 1991, the then counsel for the Wahid plaintiffs, acting responsibly, moved for a dismissal of their claims against UCIL (JA1106-08), acknowledging that the plaintiffs were "incorrect" in their earlier contention that UCIL "had done business in Texas and was subject to the liberal provisions of our long-arm statute." The dismissal of UCIL was, counsel for the Wahid plaintiffs wrote, a "responsible act." (JA6278-79). Counsel also stated that he "still

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[3] UCIL was the only other named defendant in the Wahid action. UCIL, UCE, UCC and the Enserch defendants were named as defendants in the Bi action.

d[id] not know to what extent" the Wahid plaintiffs had participated in MDL 626 but that he was "endeavoring to find out." (JA6279).

b. Union Carbide's Motion To Dismiss

On May 24, 1991, Union Carbide filed its motion to dismiss or, in the alternative, for summary judgment. (JA1109-1339, 6287-6686, 6725-64). Union Carbide's final ground for dismissal, among many, many others, was that plaintiffs and their attorneys lacked standing and authority to maintain these actions in light of the Supreme Court of India's rulings upholding the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (the "Bhopal Act"), which gave the Union of India ("UOI") authority to represent all Indian claimants and exclusive

authority to settle on behalf of all. The Second Circuit chose to affirm the District Court's judgment of dismissal on this ground, without reaching any of the other clear grounds, to reach the same conclusion. (A10-11).

Following the motion to dismiss in the District Court, the Bi plaintiffs served a lengthy discovery request (the "demands") and requested an extension to the briefing schedule. (JA696-702). Union Carbide was compelled to move for a protective order when the Bi plaintiffs refused to withdraw these demands. (JA639-702). The Bi plaintiffs did not respond to that motion, thus waiving their right to seek this discovery.

In August, 1991, the Wahid plaintiffs filed a brief in opposition to the motion to dismiss. (JA525-75).

The Wahid plaintiffs offered an affidavit from an individual who was not a plaintiff, asserting that the Wahid plaintiffs had not participated in either the UOI's action in India or MDL 626. No Wahid plaintiff stepped forward to attest to these representations.[4] (JA576-77).

Subsequently, Union Carbide received a copy of another Bi motion for a further extension of time to substitute a promised affidavit for another. (JA250-54). The assertions in

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[4] The assertions of Ms. Laughlin, a Rice University anthropology student, were not based on firsthand knowledge and included claims -- such as the assertion of UCIL's presence in Texas (JA457) -- that are at odds with the position of plaintiffs' counsel in the Wahid action. (JA6278-79). The affidavits of Ms. Laughlin and Abdul Jabbar Khan were contradicted by Union Carbide below. (Contra P12).

this motion contradicted counsel's previous representation that the original affidavit was in transit from India. (JA251-53). On October 4, 1991, the Enserch defendants served a brief and affidavits in response to the Bi plaintiffs' cross-motion (JA6237-68), Union Carbide served its reply papers (JA6070-6122, 6123-6214) and set forth that most, if not all, of the Wahid and Bi plaintiffs had previously filed claims in MDL 626. (JA6123-33).

On February 18, 1992, the District Court granted Union Carbide's motion to dismiss, applied federal forum non conveniens law, held that the analysis and results of its 1986 opinion were still appropriate, refused to reconsider Judge Fisher's rulings and also denied the Wahid plaintiffs' motion to remand. (A9-19).

3. Disposition at the Second Circuit Court of Appeals

On January 26, 1993, the Second Circuit Court of Appeals ruled that it would defer to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. The court held that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the government exclusively represents the victims in courts around the world, it would not pass judgment on that determination, and would permit only the foreign government access to our courts to litigate those claims, subject of course to the standing requirements of our courts. As the court noted, such a

result is "especially compelling in a case such as this where almost all of the victims are Indian citizens." (A44). The court also determined that courts in our federal system must respect an act of a foreign country which purports to deprive the victims of a mass tort of standing to sue in our courts as a question of federal common law binding on state and federal courts alike. As the court stated, "[t]he considerations underlying this determination implicate the relationship between our nation and India and are uniquely federal in nature." (A45). The court continued, "permitting individual states to develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of foreign

relations." (A45-46). The court concluded that since the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding petitioners' lack of standing that the appellate court had reached, a remand would be "pointless." (A46).

4. Additional Facts Relevant to the Instant Petition

Petitioners ignore the fact that their claims were dismissed on forum non conveniens grounds in 1986, and then later, the UOI commenced suit in India against Union Carbide on their behalf. The UOI prosecuted the Bhopal litigation to its conclusion in India. Petitioners' claims were thereafter fully, fairly and finally resolved by the highest court in India.

Petitioners assert that the Indian proceedings were inadequate, without disputing the material facts concerning the Indian proceedings.[5] The Indian Parliament's promulgation of the Bhopal Act facilitated the UOI's prosecution of all Bhopal-related claims. (JA6583-84, 6754). Petitioners must also concede that the Bhopal Act gave the UOI the "exclusive right to" represent its citizens in all Bhopal-related claims, including the exclusive right to institute, withdraw or compromise such claims. (JA6585, 6754). Based on the Bhopal Act, the UOI has consistently maintained that it

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[5] Petitioners' counsel does not dispute that he had his chance to represent plaintiffs in India. No American attorneys ever participated in the litigation commenced in the Bhopal district court, although they could have made such an application to do so. (JA6589-91, 6734).

is the exclusive representative of all claimants. (A27).

Petitioners also cannot dispute that litigation proceeded intensely in India for almost two and a half years, with lengthy hearings, numerous applications and petitions before all levels of the Indian judiciary, commencing in the Bhopal district court.[6]

After lengthy briefing and months of oral argument by Union Carbide and the UOI on appeals, the Supreme Court of India on February 14, 1989 effectuated by Order, a settlement of

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[6] The High Court of Madhya Pradesh and the Supreme Court of India heard appeals on the matter. From September, 1986 to February, 1989, the litigation was conducted on behalf of the victims by the Attorney General of India and other highly competent Indian lawyers. (JA6755-59).

"all claims, rights, and liabilities related to and arising out of the Bhopal . . . disaster." (JA6592-93, 6758). Pursuant to that Order and an Order dated February 15, 1989 (JA6594-96), Union Carbide and UCIL agreed to pay $470 million to the Registrar of the Supreme Court of India (JA6758-59), and it was paid by Union Carbide and UCIL on or about February 24, 1989. (JA6597-99, 6759).

The Terms of Settlement set forth the details for the final disposition of the litigation and were incorporated into the February 15, 1989 Order. (JA6596, 6760-61). By Order dated May 4, 1989, the Supreme Court set forth the reasons that had persuaded it that the Settlement Orders issued in February, 1989 were "just and reasonable." (JA6604-13, 6761).

On December 22, 1989, following lengthy hearings (and after challenge by, among others, the claimants the UOI represented under the authority granted to it under the Bhopal Act), the Supreme Court issued an eighty-seven page judgment upholding the constitutional validity of the Bhopal Act. The Supreme Court confirmed the UOI's exclusive authority to compromise all claims made or that could be made against Union Carbide and UCIL arising from the Bhopal tragedy. (JA6615-84, 6761-63).

Thereafter, the Supreme Court entertained challenges to the settlement and on October 3, 1991, issued a judgment upholding the terms of the settlement, thus fully and

finally resolving all civil claims against Union Carbide and UCIL.[7]

All of the counsel who represented petitioners below have now withdrawn. (JA6269-73). Petitioners' alleged counsel has presented no evidence that the Indian nationals he purports to represent authorized either the substitution of counsel or the pursuit of this petition. In fact, the attorney pursuing this petition could not conduct the litigation below because he was suspended from the practice of law for professional misconduct, although it has become

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[7] As reported in the New York Times at D-7 (June 22, 1992), the UOI has now fixed compensation for the Bhopal claimants, and the UOI's seventeen (17) special courts set up to hear individual claims for relief have already addressed thousands of claims. Id. Distributions to claimants have now occurred.

clear that he was directing the course of that litigation behind the scenes. (JA1114).

SUMMARY OF ARGUMENT

The Second Circuit correctly ruled, pursuant to comity principles that govern the relationships among nations, that the federal and state courts of this country should defer to the judgment of the UOI, a democratic foreign government, that disputes arising from a mass tort occurring within that foreign government's own borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world. The petition should be denied because the Second Circuit's dismissal of the actions for lack of standing is in accordance with well-

settled authority of this Court respecting comity principles and the act of state doctrine. Moreover, the Second Circuit correctly decided the issue of petitioners' standing to bring suit in the first instance.

Nor does the petition present any issues of federal law which should be addressed by this Court. The court below applied sound, uniform principles of federal law to determine that these cases were properly removed to federal court and, thereafter, properly dismissed rather than remanded to state court. Moreover, there is no conflict among the courts with respect to the standards and burdens in fraudulent joinder removal cases. The lower courts properly decided the fraudulent joinder issue in favor of respondents and petitioners' arguments concerning

veil-piercing, alter ego and agency do not raise any issues concerning a conflict among the courts and do not concern an important question of state law. There is also no conflict among the federal courts concerning the futility exception recognized by this Court in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700 (1991), where, as the Second Circuit correctly determined here, the Texas state court would also be bound by the same rules of standing.

Finally, petitioners do not raise any question regarding the doctrine of forum non conveniens. The District Court properly determined that petitioners were estopped from raising the forum non conveniens issue, which had been fully and fairly litigated

under federal common law in MDL 626. This Court declined to grant certiorari at that time to review the Second Circuit's decision affirming the dismissal. Even assuming that the collateral estoppel doctrine did not bar re-litigation of the forum non conveniens issue, the petition does not raise an issue of federal law as the federal common law doctrine of forum non conveniens applies in a diversity case removed from state court.

ARGUMENT

POINT I

WELL-ESTABLISHED PRINCIPLES OF COMITY AND THE ACT OF STATE DOCTRINE DICTATE THAT UNITED STATES COURTS RESPECT THE UNION OF INDIA'S DECISIONS REGARDING STANDING

In dismissing petitioners' actions for lack of standing, the Second Circuit acted in accordance with well-settled authority of this Court

concerning comity principles and the act of state doctrine.[8] Petitioners

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[8] The Second Circuit was correct in deciding the issue of standing first. As this Court has stated, "standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). See also Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir. 1991)("it is necessary first to address the question of . . . standing . . . . Because standing is jurisdictional under Article III of the United States Constitution, it is a threshold issue in all cases since putative plaintiffs lacking standing are not entitled to have their claims litigated in federal court.") (citation omitted); Harris v. City of Zion, 927 F.2d 1401, 1404 (7th Cir. 1991).

There is no conflict among the circuits on the issue of whether in a removed case the court should address a plaintiff's remand motion first. (P35-39). The one decision cited in which the court addressed the remand motion first expressly

(continued...)

present no issue of federal law which should be addressed by this Court.

Our courts have long recognized the doctrine of comity, which has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another . . . ." Hilton v. Guyot, 159 U.S. 113, 164 (1895). United States courts do not interfere in the internal affairs of foreign states in cases where such involvement would have a negative impact on U.S. relations with a foreign country. Comity is thus invoked in cases where the acts of foreign countries are implicated, not as a matter of

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[8](...continued)
assumed the correctness of Walker v. Savell, 335 F.2d 536 (5th Cir. 1964), which held courts are free to determine other motions before addressing a remand motion.

obligation, but out of deference and mutual respect. Id.

This case presents the paradigm situation that requires application of comity principles. The Bhopal Act was promulgated by the legislative branch of a democratic foreign state, the UOI, in response to a mass tort occurring within its borders. It grants the UOI exclusive standing to represent its citizens in courts around the world. The highest court of India has upheld the validity of the Bhopal Act and the settlement made pursuant to the Act. (A37-38).[9] In reference to the courts

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[9] The Texas Uniform Foreign Money Judgment Act and cases concerning standing for collateral attack are irrelevant here. (P57-58). The Bhopal Act granted exclusive standing in this matter to the UOI. Petitioners therefore lack standing to invoke the Texas statute to collaterally challenge the

(continued...)

of India, the Second Circuit had earlier pronounced that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity . . . ." Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.), cert. denied, 429 U.S. 833 (1976). And, as the Second

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[9](...continued)
proceedings in India. Similarly, whether the Bhopal Act provides for all of the rights and benefits provided to members of a class in United States litigation is also irrelevant. No two judicial systems are alike in all respects. Comity compels deference and respect to those differences. See, e.g., Blanco v. Banco Indus. de Venezuela, S.A., Nos. 242, 92-7523, 1993 WL 196173, at *8 (2d Cir. Apr. 30, 1993); Sahagian v. U.S., 864 F.2d 509, 514 (7th Cir. 1988), cert. denied, 489 U.S. 1087 (1989).

Circuit later ruled with reference to this litigation, "[t]o grant the victims of the Bhopal disaster, most of whom are citizens of India, access to our courts when India has set up what it believes to be the most effective method of dealing with a difficult problem would frustrate India's efforts." (A41-42). Refusing to recognize and defer to the disposition of the issue of standing by the highest court in India would thus be an affront to the doctrine of comity.[10] See,

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[10] Petitioners argue the Second Circuit improperly applied the act of state doctrine rationale to this case. (P 53-56). None of the cases they cite however, involved a legislative act like the Bhopal Act, which was promulgated in the "public interest" to give effect to the interests of a foreign people in the wake of a tragedy which occurred in their country. The validity of that Act was upheld by their own Supreme Court.

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[10](...continued)
None of the exceptions cited by petitioners apply. The exception for acts which come to fruition outside the confines of a foreign state's territory does not apply because, as discussed above, all relevant events occurred in India. None of petitioners' authorities support their argument that the doctrine does not apply when a foreign government is the exclusive representative of its citizens. So too, the Sabbatino exception for transactions as to which there is a reasonable "degree of international consensus" (P55-56) has no application here. Petitioners fail to establish -- and could not establish -- that there is a reasonable degree of international consensus contrary to the view held by the Indian Supreme Court and our Second Circuit.

Indeed, the Second Circuit implicitly recognized that the UOI had attempted to deal with a problem of "mass proportions" (A41) never encountered before, and concluded that it would not pass judgment on the manner in which that problem has been resolved, because "it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in

(continued...)

e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Cunard Steamship Co. v. Salen Reefer Servs. AB, 773 F.2d 452 (2d Cir. 1985); Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976); Jhirad v. Ferrandina, 536 F.2d 478; IIT v. Lam (In re Colorado Corp.), 531 F.2d 463 (10th Cir. 1976); British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869 (9th Cir. 1974).

Principles of comity are embodied in the act of state doctrine. As noted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 416, the "classic American statement of the act of state doctrine" is contained in Underhill v. Hernandez,

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[10](...continued)
the future." (A43).

168 U.S. 250, 252 (1897), where this Court held:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

See also United States v. Merit, 962 F.2d 917 (9th Cir. 1992); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956). These principles, enunciated in the Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987), provide that courts will refrain from sitting in "judgment on other acts of a governmental character done by a

foreign state within its own territory and applicable there."

According deference to the acts of the UOI and the decisions of the Indian Supreme Court is consistent with the promotion of uniform federal policy on issues of international concern. As the Ninth Circuit has stated, "[t]o participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy." International Ass'n of Mach. and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The Second Circuit has also noted the importance of a uniform federal foreign policy in this regard, stating with regard to the instant cases, "permitting individual states to

develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of foreign relations." (A45-46).

POINT II

THE COURT BELOW CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL

Petitioners' rhetoric concerning the "sacred principle of federalism" and the "total anarchy . . . when it comes to multi-national corporations" (P19, 20; see also id. at 28-29, 47-48), ignores the fact that the courts below applied sound, uniform principles of federal law to find: (1) that this case belonged in federal court; and (2) that this case was properly dismissed rather than remanded to state court.

A. There Is No Conflict Regarding the Burdens in Fraudulent Joinder Cases

Petitioners recognize (P39-41) that the Fifth Circuit has found that there are two circumstances when a court will find fraudulent joinder.

> The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984). See also East Texas Mack Sales, Inc. v. Northwest Acceptance Corp., 819 F.2d 116, 119 (5th Cir. 1987).

However, contrary to petitioners' assertions (P40-41), this Court's decision in Wilson v. Republic Iron &

Steel Co., 257 U.S. 92 (1921), is not inconsistent with the cases cited above. Indeed, Wilson merely addresses the procedure for challenging fraudulent joinder and not the standards or burdens necessary for making such a case. Id. at 97.

Further, the Second Circuit's finding in Norwalk v. Air-Way Electric Appliance Corporation, 87 F.2d 317, 320 (2d Cir. 1937), that "proof of fraud must be clear and convincing," does not conflict with the "no possibility" rule. Rather, it is indicative of the same exacting burden placed upon defendants in fraudulent joinder cases by the Fifth Circuit. Petitioners failed to discuss decisions from the district courts of the Second Circuit which clearly show the burdens are the same. See, e.g., Metropolitan Prop. &

Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 889 (D. Conn. 1991) (joinder may be fraudulent where "'no factual basis exists for an honest belief on the part of plaintiff that there is liability'", quoting Quinn v. Post, 262 F. Supp. 598 (S.D.N.Y. 1967)); Fahnestock & Co. v. Castelazo, 741 F. Supp. 72, 74 (S.D.N.Y. 1990) (citing Green v. Amerada Hess, 707 F.2d 201 (5th Cir. 1983), among other cases, for proposition that "defendants must show bad faith with sufficient certainty that there is no 'reasonable basis for predicting that state law might impose liability on the non-diverse defendant.'"); American Mutual Liab. Ins. Co. v. Flintkote Co., 565 F. Supp. 843, 845 (S.D.N.Y. 1983) ("the stringent test for fraudulent joinder has uniformly been at least whether

there is any reasonable basis for predicting that state law might impose liability on the non-diverse defendant," and citing B., Inc. v. Miller Brewery Co., 663 F.2d 545 (5th Cir. 1981), among others, for the proposition that "[o]ther courts have expressed the evidentiary test [for fraudulent joinder] in equally exacting terms").

B. The Lower Courts Properly Decided this Case Belonged in Federal Court

No questions of importance are raised by petitioners' attempt to re-argue the District Courts' decisions concerning whether this case should be remanded. (P41-48). Petitioners advance various theories concerning corporate veil-piercing, alter ego and agency (see id.) in support of their argument that joinder of certain of the

defendants was not fraudulent. They also argue that they were denied discovery with respect to these jurisdictional issues. (See id. at 14, 45-47).[11] Such arguments are advanced

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[11] Petitioners' contention that the courts below were required to permit discovery with respect to in personam jurisdictional issues overlooks the incontrovertible fact that discovery was abandoned by petitioners when faced with a motion for a protective order. Although a court "must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties," Herbert v. National Academy of Sciences, 974 F.2d 192, 198 (D.D.C. 1992), a court may deny a plaintiff an opportunity to engage in such discovery where, as here, the plaintiffs chose to waive their opportunity for discovery and their jurisdictional claims are frivolous. Singletary v. B.R.X., Inc., 828 F.2d 1135, 1137-38 (5th Cir. 1987) (plaintiff failed to appeal order of magistrate limiting scope of discovery, failed to use ten additional interrogatories and failed to present issue of

(continued...)

in an attempt to raise issues for this Court where none exist.

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[11](...continued)
incomplete answer to district court); Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982) (frivolous jurisdictional claims); Washington v. Norton Mfg., Inc., 588 F.2d 441, 447 (5th Cir.), cert. denied, 442 U.S. 942 (1979).

The record establishes that petitioners waived their right to seek discovery on jurisdictional issues by failing to respond to Union Carbide's motion for a protective order. (JA639-702). The motion was made when the Bi plaintiffs sought discovery from Union Carbide on jurisdictional issues, among others (JA696-702). Their failure was a concession that their discovery demands were frivolous and an unjustified waste of the District Court's and the litigants' time and expense. Moreover, petitioners' claim rings hollow in light of the Wahid plaintiffs' voluntary dismissal of their claims against UCIL (deemed by Wahid counsel to be a "responsible act" (JA6278-79)) because their attorneys had concluded they were "incorrect" in their claim that UCIL was subject to the in personam jurisdiction of the Texas state court. (Id.)

It is implicit in Judge Fisher's orders dismissing the Enserch defendants and denying the Bi plaintiffs' motion to remand that petitioners fraudulently pled a cause of action against Enserch and H&G-Texas and that petitioners fraudulently pled jurisdictional facts against UCE, UCIL, H&G-London and H&G-India. Judge Keenan's decision denying the Wahid remand motion also confirms that the defendants amply demonstrated fraudulent joinder.

It is also incorrect for petitioners to suggest that a factual record had not been developed by the defendants. (P14, 45-47). UCIL, UCE, H&G-London and H&G-India all submitted detailed, competent and uncontroverted evidence in the form of sworn affidavits concerning their lack of

Texas contacts. (JA6237-68). In contrast, petitioners wholly failed to set forth any facts to support their allegations that these defendants were subject to the in personam jurisdiction of the Texas state court. In addition, Enserch and H&G Texas, the in-state defendants, demonstrated through uncontroverted affidavits that there was no possibility that a valid cause of action could be asserted against them. (JA6248-56).

Apart from the issue of fraudulent joinder, the alien citizenship of UCIL, UCE, H&G-London and H&G-India was properly disregarded as personal jurisdiction over these defendants was lacking. See Nu-Way Sys. v. Belmont Mktg., Inc., 635 F.2d 617, 621 (7th Cir. 1980).

With respect to petitioners' contention that UCIL was subject to in personam jurisdiction because it was doing continuous and systematic business in the State of Texas through its parent, Union Carbide, they have not offered a single fact in support. (See P42-48). It is well established that "the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent." Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1159 (5th Cir. 1983). Such exercise of jurisdiction is only warranted when "the parent corporation exerts such domination and control . . . 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of

jurisdiction.'" Id. (quoting J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.25[6], at 4-272 (2d ed. 1982)). Once again, petitioners have completely failed to offer any facts in support. Rather, they incorrectly allege that they were "denied discovery" on the issue (P45-47), when, in fact, they have clearly waived their right to it.

C. There Is No Conflict Concerning the Futility Exception to 28 U.S.C. § 1447(c)

This Court recognized the "futility exception" to section 1447(c) in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700, 1710 (1991), noting that dismissal rather than remand is appropriate where a court is "certain" that remand pursuant to 28 U.S.C. section 1447(c) would prove futile. There, the futility

question arose when this Court concluded that the National Institutes of Health lacked authority to remove to federal court the petitioners' suit seeking an injunction against experimentation on monkeys. This Court, however, refused to dismiss the case because of "uncertainties that a remand would be futile." Id. at 1710.

The futility exception was first recognized in Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, 876 F.2d 1051 (1st Cir. 1989) ("M.A.I.N."). The M.A.I.N. court held that "we are unwilling to read . . . discretion into the statute, here, because we cannot say with absolute certainty that remand would prove futile." Id. at 1054.

Subsequently, in Bell v. City of Kellogg, 922 F.2d 1418 (9th Cir. 1991), the Ninth Circuit applied M.A.I.N.'s futility exception. The court stated that "[w]here the remand to state court would be futile . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources." Id. at 1424-25. The court found that remanding the case would be futile because the plaintiff's claim would be dismissed by the state court for failure to comply with the election law's bond posting requirement. See also Awbrey v. Jackson Band of Miwuk Indians, No. CIV. S-93-820-WBSJFM, 1993 WL 287405 (E.D. Cal. July 27, 1993) (futility exception recognized).

Subsequent to International Primate, the Second Circuit, in Mignogna v. Sair Aviation, Inc., 937 F.2d 37, 41 (2d Cir. 1991), recognized that "remand might be improper if it would be futile, as it would be if the state court could not exercise jurisdiction over [the plaintiff's] claim against [one of the defendants]." (citation omitted). The court then applied the "certainty" standard set forth in M.A.I.N. and International Primate and reversed the district court's dismissal of the case because it was not certain whether the plaintiff's tort claims against a "nonappropriated fund instrumentality of the United States," could be heard in state court. Id. at 42-43.

Several other circuits have also recently relied upon M.A.I.N. and

International Primate. Their holdings do not present a conflict with respect to invocation of the futility doctrine in this case. See Hexamer v. Foreness, 981 F.2d 821, 824 (5th Cir. 1993) (implicit in court's holding was recognition that domestic relations/garnishment action was the type of case which could proceed in state court).

Thus, the federal courts uniformly recognize that when a case is removed from state court to federal court, and the federal court determines that it lacks subject matter jurisdiction to hear the case, the federal court should remand, rather than dismiss the case pursuant to 28 U.S.C. § 1447(c), unless, as here, the court is "absolutely certain" that a remand to

state court would prove pointless or futile.

D. The Court Below Properly Applied the Futility Exception

The Second Circuit properly decided it would be futile to remand this case because the plaintiffs lacked standing to prosecute their action in state court. As the court stated, "[t]he question whether courts in our federal system must respect an act of a foreign country that purports to deprive the victims of a mass tort of standing to sue in our courts is a question of federal common law binding on state and federal courts alike." (A45).

This Court has made similar pronouncements. In Sabbatino, this Court noted:

> [w]hatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

376 U.S. at 424. See also First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1987); Republic of Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986), cert. denied, 481 U.S. 1048 (1987); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 53 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

In light of this mandate, the Second Circuit concluded in this case

that "[b]ecause the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless." (A46). Thus, this is a paradigm case where futility, as recognized in International Primate, was properly invoked.

POINT III

EVEN IF PETITIONERS HAD STANDING, THE DISTRICT COURT CORRECTLY CONCLUDED THAT THEIR CLAIMS WERE BARRED ON COLLATERAL ESTOPPEL GROUNDS

Petitioners ask this Court to address the question of whether a "federal court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome." (Pxi). Petitioners are collaterally estopped

from raising this issue, previously addressed and decided against them under the federal common law doctrine in MDL 626. This Court previously denied petitions for writs of certiorari to address that determination. See Brief in Opp. at 1.

The doctrine of collateral estoppel prohibits a party from litigating any issue that has already been litigated in a prior proceeding by the same parties or their privies.[12]

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[12] Clearly, petitioners were parties to or in privity with the parties in the previously dismissed action as the doctrine of privity is applied liberally in the preclusive context. Alpert's Newspaper Delivery, Inc. v. New York Times Co., 876 F.2d 266, 270 (2d Cir. 1989). Petitioners blatantly attempt to re-litigate the same claims in the face of unrefuted evidence presented by Union Carbide that these same petitioners had filed claims in MDL 626. (JA6070-6122, 6123-6133). Moreover, the UOI, pursuant to the Bhopal Act,

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Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979). The petitioners continue to seek to undermine the rationale behind the collateral estoppel doctrine by attempting to re-litigate the forum non conveniens issue, which was previously resolved by the District Court in its May 12, 1986 Opinion and Order. (JA5795-5857). When presented with petitioners' request that they be afforded yet another opportunity to pursue settled claims, the District Court found the requisite elements to be present. (A13-18).

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[12](...continued)
claimed itself to be the exclusive representative of and filed suit on behalf of all the Bhopal claimants in the District Court. Each and every person with claims was represented by the UOI and is bound by the dismissal of the UOI's complaint in MDL 626.

It is clear that a prior determination has collateral estoppel effect upon subsequent actions if there is identity of issues, the issue was actually litigated in the prior action, and its determination was a critical and necessary part of the earlier judgment. See Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. Unit A Dec. 1981).

All elements were satisfied here.[13] In the original action, In re

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[13] Petitioners suggest that Judge Fisher's orders granting motions to remand in Soni v. Union Carbide Corporation, ("Soni") raise a bar to litigation of the fraudulent joinder issue (A65-66, 67-68). Collateral estoppel does not control resolution of the fraudulent joinder issue because Judge Fisher's Soni orders, unlike Judge Keenan's order in MDL 626, failed to satisfy the requirements for the application of collateral estoppel. It does not apply where, as in Soni, the "judgment relied upon as a basis for

(continued...)

Union Carbide, 634 F. Supp. 842 (S.D.N.Y. 1986), as here, the issue before the court was whether the United States was a convenient forum to entertain the litigation that arose in the aftermath of the Bhopal tragedy. Petitioners pled no new facts below that would have resulted in a different forum non conveniens analysis and the District Court held, "[d]espite plaintiffs' arguments, both the analysis of the forum non conveniens factors and the result of that analysis

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[13](...continued)
the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." Parklane, 439 U.S. at 330. In all actions subsequent to Soni, including Pandey, a case also initially before Judge Fisher, where fraudulent joinder allegations were raised by defendants as a basis for the federal court's exercise of jurisdiction, motions to remand were denied. (JA6750-53).

are the same today as in 1986." (A15).[14] Thus, re-visiting the forum non conveniens issue would have required the repetition of a legal inquiry identical to one it had already performed.

Second, the forum non conveniens issue was "actually decided" in the original action. The District Court issued a sixty-three page opinion after three months of discovery on the issues

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[14] In an attempt to re-litigate the balance of private interest factors, petitioners belatedly offered the District Court various stipulations and conclusory hearsay affidavits. (A69-98, 99-134, 135-138). Petitioners could have offered the stipulations in MDL 626 but failed to do so, thus distinguishing this case from those cited in the petition. (P64-65 n.30). No case cited even suggests that the introduction of a stipulation compels the re-opening of issues already fully litigated. If petitioners' argument were taken to its logical conclusion, no litigation would ever end.

raised by the motion to dismiss, the submission to the District Court of answering, reply and supplemental briefs, and a full day of oral argument. Finally, the issue was a necessary and essential part of the judgment below as forum non conveniens was the sole ground for dismissal. In re Union Carbide, 809 F.2d at 198 n.1.

The collateral estoppel doctrine's preclusive effect has been consistently invoked where, as here, litigants have attempted to avoid the effect of a federal court's forum non conveniens dismissal by commencing litigation in another court. See Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1989) (based on two prior forum non conveniens dismissals in California, and in absence of demonstration of change in objective facts materially

altering prior analysis, plaintiffs barred from re-litigating), reh'g en banc denied, Nos. 92-7162, 93-7036 (June 30, 1993); Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975) (to same effect), cert. denied, 423 U.S. 1052 (1976).[15]

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[15] Petitioners raise the question of, when a federal court determines it is going to decline jurisdiction on forum non conveniens grounds, it should remand to state court rather than dismiss the action. (P48-51). First, this question is not presented given the collateral estoppel effect of the prior dismissal. Second, the cases cited by petitioners do not demonstrate a conflict. Certain of the cases in which dismissal was held to be improper were decided before Congress enacted 28 U.S.C. § 1404(a). Moreover, in none of the cases cited was the alternative forum a foreign court. It is elementary that "28 U.S.C. § 1404(a) . . . did not diminish the power of the federal courts to dismiss cases that should have been brought in foreign forums." Harrison v. Capivary, Inc. 334 F. Supp. 1141, 1142 (E.D. Mo. 1971). See also

(continued...)

Moreover, the circuit courts of appeals agree that it is federal forum non conveniens law -- not state law -- that governs when a federal court considers the issue of the convenience

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[15](...continued)
Vanity Fair Mills v. T. Eaton Co., 234 F.2d at 645. Here, dismissal was proper because the most convenient alternative forum is a foreign court. See Nolan v. Boeing Co., 919 F.2d 1058, 1070 (5th Cir. 1990), cert. denied, 111 S. Ct. 1587 (1991). See also Villar, 990 F.2d at 1489; Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144-45 (E.D. Tex. 1992).

Finally, Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), is inapposite. Carnegie was a federal question case removed from state court. All federal claims were dismissed, thus eliminating any basis for subject matter jurisdiction over the pendent state claims. This Court held that the district court had discretion to remand because remand to state court would best promote the values of economy, convenience, fairness and comity. None of these considerations is present here. See supra, Point II, C.

of a particular forum in a diversity action. In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), vacated on other grounds sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, aff'd in relevant part and vacated in part, 883 F.2d 17 (5th Cir. 1989); Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1219 (11th Cir.) (per curiam), cert. denied, 474 U.S. 948 (1985); Royal Bed and Spring Co. v. Famossul Industria, 906 F.2d 45, 50 (1st Cir. 1990).

Petitioners have distorted the holding in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), hoping to create the appearance of a conflict among the courts with respect to this issue. Petitioners assert that the Second Circuit in Weiss held that a federal

court sitting in diversity, after a case has been removed from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would be different had the court applied federal forum non conveniens law. (P60). To the contrary, the Weiss court simply held it would look to New York state law for guidance on the issue of its supervision over a foreign corporation's "internal affairs." Petitioners also ignore subsequent Second Circuit cases which have narrowed Weiss. See, e.g., Gilbert v. Gulf Oil Corp., 153 F.2d 883 (2d Cir. 1946), rev'd on other grounds, 330 U.S. 501 (1947) (applying federal common law to forum non conveniens analysis).

In the absence of a conflict in the law, petitioners argue in the

alternative that under Erie v. Tompkins, Texas law applies because at the time respondents moved for dismissal, Texas law as construed in Dow Chemical Co. v. Alfaro, 786 S.W.2d. 674 (Tex. 1990), would have prevented a dismissal, thus giving rise to a "different outcome".[16] (P59-60). Petitioners' argument is beside the point.[17]

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[16] The Texas Legislature has acted to narrow the scope of section 71.031, as construed in Alfaro. An amendment to section 71.031 will permit state court judges in Texas to circumscribe unfettered access by foreigners and citizens of other states to Texas courts, endowing them with discretion to consider forum non conveniens factors. See Ch. 71, Civ. Prac. and Rem. Code, Subchapter D, 1993 Tex. Sess. Law Serv. 11 (Vernon).

[17] Even if Alfaro is controlling -- which it is not -- the narrow Alfaro holding is inapplicable here because the holding refers solely to cases brought under section 71.031 of the

(continued...)

The raison d'etre of the forum non conveniens doctrine is that a court may resist imposition on its jurisdiction even when jurisdiction is authorized by the letter of the venue statute. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). It is thus clear that application of the federal common law doctrine of forum non conveniens in diversity cases does not "operate as a state substantive rule of law and thus [fails to] transgress Erie's

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[17](...continued)
Texas Civil Practice and Remedies Code. Section 71.031 provides that the action must be brought within the applicable statute of limitations period, which petitioners have failed to do. (JA6198-99). Thus, neither section 71.031 nor the holding in Alfaro applies. In view of this bar, the lack of equal treaty rights between the United States and India, yet another obstacle to the applicability of section 71.031, need not be addressed.

constitutional prohibition." Sibaja, 757 F.2d at 1219 (footnote omitted). The rationale for applying federal law to forum non conveniens motions is that Erie v. Tompkins is not implicated because "[t]he forum non conveniens doctrine is a rule of venue, not a rule of decision." Id. See generally 15 Charles A. Wright, et al., Federal Practice and Procedure, § 3828, at 294 ("it seems quite clear" that state notions of forum non conveniens should not be binding on a federal court in a diversity action).

Finally, petitioners' argument that federal courts are abusing the forum non conveniens doctrine to sanction outcome-determinative, reverse-forum shopping by defendants (P20), ignores this Court's directive that courts should not consider

defendants' "reverse forum shopping" in their analysis of the private interest factors and this Court's explicit recognition of the necessity for the doctrine given the overburdened federal judiciary and the attractiveness of American courts to foreign plaintiffs. See Piper v. Reyno, 454 U.S. 235, 252 n.18, 253 (1981).[18] Moreover,

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[18] Petitioners misrepresent the Court's holdings in Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1984). Neither holding addressed the issue of choice of forum non conveniens law. The Chick Kam Choo Court simply held that because a pre-emption question was not addressed in a prior federal proceeding, the exception to the Anti-Injunction Act did not apply and therefore the pre-emption question had to be decided by Texas state courts. Pennzoil simply held that Younger abstention required that the lower courts defer decision on federal constitutional claims because the Texas courts should have been given an opportunity to adjudicate those claims.

petitioners' citation to cases as "illustrative" of the lower court's abuse of the forum non conveniens doctrine is misleading. (P21-22, n.5). In each instance, the lower courts conducted a fact-specific analysis in accordance with this Court's guiding precedents and, in cases where review was sought, this Court denied certiorari.[19]

Finally, it is clear that the forum non conveniens doctrine was not abused in this case. As the Second Circuit stated in affirming the prior forum non conveniens dismissal of these

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[19] Petitioners' cases are essentially a list of cases in which federal courts have rejected petitioners' counsel's forum non conveniens arguments. See, e.g., McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313, 1317 (5th Cir. 1986) (Fifth Circuit reversed lower court for failure to follow this Court's forum non conveniens precedents).

same petitioners' claims, "it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal." In re Union Carbide, 809 F.2d at 202.

CONCLUSION

The decision of the Second Circuit Court of Appeals was fully consistent with established legal principles. Review is unwarranted.

Dated: New York, New York
August 11, 1993

Respectfully submitted,

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No. 93-64

AUG 11 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANO BI, individually and on behalf of the children of Rashid Kahn, and as representative of the Estate of Rashid Kahn, et al.,
Petitioners,

— against —

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.; UNION CARBIDE EASTERN, INC.; ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS PVT., LTD.; HUMPHREYS & GLASGOW, LTD.; EBASCO-HUMPHREYS & GLASGOW, INC.,
Respondents.

ABDUL WAHID, ET AL.,
Petitioners,

— against —

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS PVT., LTD.; HUMPHREYS & GLASGOW, LTD.; EBASCO-HUMPHREYS & GLASGOW, INC. ("ENSERCH DEFENDANTS")

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BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals correctly ruled, pursuant to comity principles that govern the relationships among nations, that the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within that foreign government's own borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world?

2. Whether the Second Circuit Court of Appeals should have affirmed the judgment of the Honorable John F. Keenan dismissing the complaints or remanded to the District Court with

directions to remand the suits to the Texas state court when that remand would have been a futile act?

CORPORATE DISCLOSURE STATEMENT

Enserch Corporation, its subsidiaries and their subsidiaries and affiliates, respectively, are as follows:

Name

Enserch Corporation's subsidiaries are:

- Lone Star Gas Company of Texas, Inc.
- National Pipeline Company
- Enserch Gas Transmission Company
- Lone Star Energy Company, its subsidiaries are:
  - Fleet Star of Texas, L.C. (1)
  - TRANSTAR Technology, L.C. (1)
  - Lone Star Plan Analytical Services, Inc.
  - Lone Star Energy Plant Operations, Inc.
  - Lone Star Gas Argentina, Inc.
- LS Energy, Inc.

Enserch Development Corporation, its subsidiaries are:

- Enserch Development Corporation One, Inc.
- EDC Catskill Cogeneration, Inc.
- EDC Four Inc.
- EDC Frederickson, Inc.
- EDC Northwest Cogeneration, Inc.
- EDC Southeast, Inc.

Enserch Processing, Inc.

Enserch Exploration, Inc.

Enserch SACROC, Inc.

Enserch International Exploration, Inc., its subsidiaries are:

- Enserch Far East Ltd.
- Enserch Offshore Java Ltd.
- Enserch Tunisia, Inc.
- Enserch Exploration (U.K.) Limited

Enserch International Investments Limited, its subsidiaries are:

- Enserch Holdings Limited*

Humphreys & Glasgow Limited*

Process Engineering, Inc.

Earl & Wright Ltd.*

Process Engineering International Limited, its subsidiaries are:

H & G Technology Ltd.

Humphreys & Glasgow (Malaysia) Sdn. Bhd.

Humphreys & Glasgow (Canada) Limited

Humphreys & Glasgow Pacific Pty. Limited

Humphreys & Glasgow (Atlantic) Limited

Process and Energy Consultants Limited

Humphreys & Glasgow Europe Limited

Humphreys & Glasgow (Overseas) Limited

Canatom Heavy Water Limited (1)

ENSERCH Finance N.V.

Enserch House, Inc.

ENS Insurance Company

ENS Claims Management, Inc.

Enserch Shirley, Inc.

Dorsch Consult GmbH (3)

Ebasco Services Incorporated, its subsidiaries are:

- Ebasco Corporation
- Ebasco Engineering and Construction Corporation
- Ebasco Industries Inc. (Delaware)
  - Ebasco-CTCI Corporation (4)
  - Ebasco B.V.
    - Qualitec Ebasco GmbH (3)
    - Ebasco Italia S.r.I.
  - Industrial Assistance Corporation
  - Ebasco Dorsch Consultants Inc. (5)
  - Enserch Engineers & Constructors, Inc.
  - Ebasco V.I. Inc.*
  - Ebasco Cayman Limited
    - Ebasco Arabia Limited (1)*

Ebasco Services Singapore Pte. Ltd.

Ebasco Energy A.G.

Ebasco Espana, S.A. (1)

Ebasco Qualtech Korea Inc.*

Ebasco Services International Inc.

Ebasco International Corporation

Ebasco Overseas Corporation

Ebasco Risk Management Consultants, Inc.

Associated Company Management of Ebasco Limited

INDECS of Ebasco Inc.

Ebasco Services of Canada Limited

Ebasco Sales Inc.

Ebasco Plant Services, Inc.

Ebasco Constructors Inc., its subsidiaries are:

Aleasco, Inc.

Frank Moolin &
Associates, Inc.

Ebasco Constructors
International, Inc.

Ebasco (U.K.)
Limited

Ebasco Limited

ENS Equipment Corporation

Hittman Ebasco Associates Inc.

Ebasco Massachusetts Inc.

Ebasco Environmental
International Inc.

E & L Technologies Inc.

E & L Engineering Inc.

E & L Associates Inc.

E & L International, Inc.

Ebasco Environmental Management
Company of Ohio, Inc. (6)

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* Company in liquidation.

(1) 50% owned by parent corporation.

(2) 40% owned by parent corporation.

(3) 49% owned by parent corporation.

(4) 47% owned by parent corporation.

(5) 80% owned by parent corporation.

(6) 67% owned by parent corporation.

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COUNTERSTATEMENT OF THE CASE

Enserch Corporation; Humphreys & Glasgow Consultants Pvt., Ltd.; Humphreys & Glasgow Ltd.; and Ebasco - Humphreys & Glasgow, Inc. ("Enserch Defendants"), Respondents herein, adopt, by this reference thereto, the Counter-statement of the case of Respondent, Union Carbide Chemicals and Plastics Company Inc. ("Union Carbide").

SUMMARY OF THE ARGUMENT

The Enserch Defendants adopt, by this reference thereto, the Summary of the Argument of Respondent, Union Carbide.

ARGUMENT

The Enserch Defendants adopt, by this reference thereto, the Argument of Respondent, Union Carbide.

CONCLUSION

The decision of the Second Circuit

Court of Appeals was fully consistent with established legal principles. Review is unwarranted.

Dated: Liberty, Texas
August 11, 1993

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

No. 93-64

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al.,

Petitioners

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al, formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA LTD; UNION CARBIDE EASTERN, INC.; ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS; HUMPHREYS & GLASGOW, LTD; EBASCO-HUMPHREYS & GLASGOW, INC.

Respondents.

ABDUL WAHID, et al.

Petitioners,

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC, formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.,

Respondents.

On Petition For a Writ of Certiorari To The United States Courts of Appeals For The Second Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

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C. Wright, A. Miller & E. Miller, Federal Practice & Procedure, §3723, pp. 342, 343 11

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Model Code of Professional Responsibility, Canon 5; DR5-105(A) 6

Re, E., Foreign Confiscations in Anglo-American Law, 170 (1951) 10

Restatement (Second) of Foreign Relations Law, Sect. 41, cmt. d (1965) 8

Singh, N. K. and Devades, David, "The Settlement Drama", India Today, Dec. 15, 1987, pp. 42-46 3

Singh, N. K., "The Bhopal Bonanza", India Today, Sep. 30, 1987, pp. 94-96 3

Singh, N. K., "The New Nightmare", India Today, Dec. 15, 1986, pp. 128-132 3

Singh, Raminder and Kakaria, Amrit, "Unsettling Verdict", India Today, Mar. 15, 1989, pp. 42-46 3

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

PRELIMINARY STATEMENT

The Respondents' "Counterstatement of the Case" is blatantly inaccurate in many respects, as will be pointed out from time to time *infra*, but most disturbing is that it ignores or glosses over with superficial varnish the terrible truth about what has really happened in India since the tragic disaster of December 1984. See pp. 7, 11, 13–18 of Respondents' Brief In Opposition.

The Respondents incredulously state that the "Petitioners' claims were thereafter (after the Indian government, 'UOI', commenced litigation in India on behalf of the Bhopal victims) fully, fairly and finally resolved by the highest court in India," p. 13 Resp. Opp. Br.; shockingly claim that the Petitioners did not dispute "the material facts concerning the Indian proceedings", Id. at p. 14; and then flatly misrepresent the present situation in India: "[d]istributions to claimants have now occurred", implying that the Bhopal victims have somehow finally received real justice at last. Id. at pp. 14–18.

Our general response to these outrageous statements is that the uncontradicted affidavits

in the record, together with the broadly accepted published literature, establish these incontrovertible facts: the Bhopal tragedy is the greatest and most devastating industrial disaster in history; over 500,000 Indian citizens were either killed or injured; this terrible event was caused by the negligence, and probably the gross negligence, of American-based multi-nationals and their foreign subsidiaries (the Union Carbide and Enserch multi-nationals); the great majority of the victims have always vehemently opposed the settlement as being completely inadequate, completely unfair and the result of collusion;[1] the settlement produced by such collusion is in fact grossly inadequate; in fact, it is so bad that the short-lived government of V. P. Singh attempted to "rescind the settlement"; the victims were not given notice of the settlement proceedings, or allowed to participate, were not consulted and were not given the right to opt-out; and, contrary to what

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[1] Such collusion was spawned out of the undisputed triple conflict-of-interest that existed: UOI owned a substantial interest in a primary defendant, Union Carbide of India Ltd. ('UCIL') and at the same time undertook to be the sole representative of the victims. UCIL also appointed the judges who were the factfinders in all proceedings.

the Respondents have stated, the latest report indicates that only 800 out of over 500,000 claims have in fact been processed. The way the claims are being processed, "it could take up to twenty years to settle all claims". Except as to the 800 processed claims (claimants in those cases have received only a pittance), the only money that has been paid to the victims is RS 200 ($12.00) per month paid by UOI out of public funds (not the settlement funds) to the residents of the thirty-six gas-affected wards of Bhopal as a sort of "interim subsistence"[2].

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[2] See affidavits of Abdul Jabbar Kahn, A 69-98, particularly A 71, 74-80, 82-85, 86, 87 (the latter cite discusses how over 11,000 death claims and 508,000 injury claims had been filed and that just "adequate health and economic rehabilitation will require in excess of $4 billion" [not counting "soft damages"]) and Kim Laughlin, A 99-138, particularly A 99, 101, 114-123, 125-128, 133-134; and such articles as N. K. Singh and David Devades, "The Settlement Drama", India Today, Dec. 15, 1987, pp. 42-46 (anything less than $3 billion would constitute acceptance of the view that "Indian life and health were less valuable than American life and health"); N. K. Singh, "The New Nightmare", India Today, Dec. 15, 1986, pp. 128-132; N. K. Singh, "The Bhopal Bonanza", India Today, Sep. 30, 1987, pp. 94-96 ("Over half of the money appropriated in 1987 for victim relief was spent on furniture and motor vehicles for health officials"); four publications - Will Lipkowski, "Bhopal Indian City Begins to Heal But Conflicts Remain", C.&E.N. Dec. 2, 1985, pp. 18-32; paper prepared by Armin Rosencranz, Shyam Divan and Anthony Scott, soon to be published by the U. of Pa. press (hereafter "Rosencranz Paper') at pp. 3-20; Raminder Singh and Amrit Kakaria, "Unsettling Verdict", India Today, Mar. 15, 1989, pp. 42-46; N. D. Jayaprakah, "Perilous Litigation, The Leak

The entire situation in India has been nothing less than a shocking judicial debacle. As we stated in the Petition, unless this Court grants certiorari, it now appears that these star-crossed victims of this unprecedented catastrophe will never see real justice.

Disaster Case", Economic and Political Weekly 25, No. 51, Dec. 22, 1990, pp. 2761-66 - discuss how the collusive settlement was orchestrated in the (Indian) Supreme Court's chamber; how "Rajiv Ghandi's government had colluded with Union Carbide to 'break the victims back' making them more amenable to a small settlement", and how "[o]bservers in India and abroad understood that the (Indian) Supreme Court's action was in no sense a genuine order ... The parties agreed to the $470 million far too easily for anyone to believe that the 'order' had not been prearranged"; and Rosencranz Paper, Chapter entitled Legal and Political Repercussions In India, discussing how Prime Minister Singh's attempted "to set the Carbide money aside, undertook to compensate the victims from public monies, and asked the Court to rescind the settlement"; and how the Government of Prime Minister Chandra Shekhar, which succeeded the Singh administration in November 1990, reestablished the old Rajiv Ghandi policies and orchestrated yet another corrupt approval of the grossly inadequate settlement. Despite the October 16, 1992 order of the Supreme Court setting up 40 claims courts to finally start processing claims, after eight months only 800 claims had been processed so that, "at this rate it could take up to 20 years to settle all claims". pp 3-21 of Rosencranz Paper. Indeed the turmoil in India continues to this day; the Times of India reported as recently as August 25, 1993: "More than 1,000 activists belonging to the Bhopal Gas Preedit Mahila Udyog Sanghatan courted arrests yesterday to protest against the procedure adopted for scrutinizing the claims in the second phase of the distribution of the interim relief ... there have been charges of corruption and irregularities in the procedure for the distribution of the declaration forms which have to be submitted by the claimants to get the second phase of interim relief."

I.
Petitioners' Reply To Respondents' Arguments Concerning "Comity and the Act of State Doctrine"

Respondents focus heavily upon the act of state doctrine, see pp. 19-32 of Opp. Br. Our position, however, is that the Court should grant certiorari because the decision of the Court of Appeals directly conflicts with several lines of authority in this important area of the law. The Respondents have failed to address and/or overcome these points:

1) As noted in W.S. Kirtkpatrick v. Environmental Tectonics Corp., 110 S.Ct. 701, 704 (1990), the act of state doctrine has constitutional underpinnings involving the "domestic separation of powers" but Petitioners contend that the force of that constitutional aspect is overwhelmed by the constitutional and statutory right of parties in the federal court to have counsel of their own choice and this means counsel who do not have a conflict of interest. See McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1262 (5th Cir. 1983); Bottard v. Hatton Assoc., 680 F.2d 895, 897, n. 2 (2nd Cir. 1982); and Davis v. Stamler, 650 F.2d 477, 480

(3rd Cir. 1981).[3] We submit that the Court should grant certiorari to resolve the clash between these two sets of constitutional rights.[4]

2) "Exclusivity" provisions enacted by foreign nations simply are not enforced in our courts. In Randall v. Arabian American Oil Company, 778 F.2d 1146 (5th Cir. 1985), Saudi Arabia adopted a law giving the Saudi Arabia Labor Commission the "exclusive jurisdiction" over suits for wrongful discharges occurring in Saudi Arabia. The U.S. district court held that it was bound by such provision under the act of state doctrine and the Court of Appeals reversed.[5]

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[3] In McCuin the Court stated that and "the right to counsel in civil cases is no less fundamental (than the right to counsel in criminal cases) and springs from both statutory authority and from the constitutional right to due process of law." 714 F.2d at 1262. Bottard based the right to counsel upon 28 U.S.C.§ 1654.

[4] U.O.I., as the representative of the plaintiffs, and U.O.I's chosen counsel, would have to be disqualified in the American courts because they have a conflict of interest. McCuin, 714 F.2d at 1262; TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(a) (1989) *reprinted in* TEX. GOVT. CODE ANN., tit.2, sub tit. G app.(Vernon Supp. 1992) (STATE BAR RULES art. X, § 9).

[5] The Court stated:

"We reject outright the notion that the law of a foreign country can unilaterally curtail the power

3) The "commercial activity" exception to the act of state doctrine was applied in W. S. Kirkpatrick & Company, Inc. v. Environmental Tectonics Corp. Intern., 847 F.2d 1052, 1059, aff'd, 493 U.S. 400, 110 S. Ct. 701 (1990); Nelson v. Saudi Arabia, 923 F.2d 1528, 1531-32 (11th Cir. 1991), and Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1387-88 (5th Cir. 1992).[6] There is no doubt that UOI, by owning a substantial interest in the "industry" being operated by UCIL, was engaged in a "commercial activity" and, since the Bhopal Act was passed to facilitate the settlement of the claims arising out of that

---

of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation... By refusing to enforce the exclusive jurisdiction provision of the Labor Law we are not judging the validity of that provision within the territorial sovereignty of Saudi Arabia in violation of the Act of State Doctrine. We are simply refusing to give that provision effect within our country and our courts."

778 F.2d at 1150. See also, cases cited at pp. 55, 56 of Pet.

[6] In Walter Fuller, the Court noted that if the nature of the transaction is essentially commercial then, even though "public acts lurk in the background", the act of state doctrine does not apply. 965 F.2d at 1388. Moreover, commercial activity was defined in Nelson as engaging "in industrial, commercial, financial or other business enterprise in which private persons may there engage." 923 F.2d at 1532.

activity, the so-called "act" which the Court of Appeals held subject to the act of state doctrine was part and parcel of the commercial/industrial activity of the chemical plant operation in India.

4) In Timberlane Lumber Company v. Bank of America, N.J. & S.A., 549 F.2d 597, 607, 608 (9th Cir. 1976), the Court, citing the Restatement (Second) of Foreign Relations Law, Sect. 41, cmt. d (1965), held that an "act of state" is one that involves the public interests, "as distinct from its interest in providing the means of adjudication of disputes or claims that arise within its territory". Surely, the Bhopal Act was one that dealt with the "means of adjudication of claims that arise within its territory."

5) Finally, Respondents do not dispute that they had the burden of proving that the act of state doctrine applied, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695, 96 S.Ct. 1854, 1861-62 (1976) and Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 n.4 (3rd Cir. 1982); that burden included the obligation, in a case such as this one, to obtain the views of the State Department as to whether

the foreign policy of the United States would, in its opinion, be adversely impacted by not applying the act of state doctrine to the Bhopal Act. The Respondents failed to offer such proof and the Court of Appeals did not require one either. Thus, on the basis of the record before this Court, on that element alone the act of state doctrine does not apply.[7]

It is hard to understand the Court of Appeals' rationale for its decision in connection with the act of state doctrine. The Court admitted that the decision it reached involved "an issue of first impression", A 39, and that "the act of state doctrine is not precisely applicable here." A 42. But, other than mentioning "comity" generally,[8] the Court never clearly identified precisely what rule of law it applied, if any, to reach its result. This

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[7] As we discussed in the Petition, there are other grounds for holding that the act of state doctrine does not apply, such as those expressed in Kirkpatrick and such as the consensus doctrine, see Filartiga v. Pena-Irala, 577 F.Supp. 860 (E.D. N.Y. 1984) and pp. 52-56 of Pet.

[8] And if "comity" is the basis for the decision, then Petitioners are entitled to collaterally attack the Bhopal Act and the settlement judgment in accordance with Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895) and, as discussed in the Petition, see pp. 57-58, there are several fact issues in that regard, any one of which precluded summary judgment and/or dismissal.

defies the doctrine of stare decisis and further suggests the need for the grant of certiorari.[9]

II.
Reply to Respondents Arguments Concerning Fraudulent Joinder

Respondents argue that "discovery (on the personal jurisdiction and remand motions) was abandoned by petitioners when faced with a motion for a protective order." n. 11, p. 37 of Resp. Opp. Br. That statement is outrageous.

Indeed, Respondents themselves state in their motion for a protective order that Judge Keenan had, before they filed the motion, already stated at the Status Conference on April 8, 1991 that he would not reconsider Judge Fisher's precipitous actions in the Bano Bi case and had ordered that further "discovery would not be in order." A 686, 687. Now how can the Respondents with a straight face contend that Petitioners

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[9] It also defies the present trend of narrowing the act of state doctrine and its rationale rather than expanding it, as the Court of Appeals now seeks to do. See Kirkpatrick, 110 S.Ct. at 701 and Nelson, 923 F.2d at 1531. The Court in Nelson noted:

> "Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. Indeed, it was suggested years ago that the act of state doctrine had 'earned a well-deserved rest.'"

See also, E. Re, Foreign Confiscations in Anglo-American Law, 170 (1951) and Cardozo, International Law in the New York Courts - 1953, 40 Cornell L.Q. 937, 109 (1955).

"waived" a right by failing to exercise it when, as Respondents assert, Petitioners were ordered by the Court not to exercise it?

The most dissembling statements in Respondents' Opp. Br. are those found at pp. 39-40 where they claim to have offered "detailed and competent" proof that the alien defendants had no contacts with Texas; that "there was no possibility that a valid cause of action could be asserted against" the in-state defendants; and that "petitioners wholly failed to set forth any facts to support their allegations that these (alien) defendants were subject to the in personam jurisdiction of the Texas state court".[10]

The "detailed and competent proof" that the

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[10] "A claim that joinder is fraudulently intended to defeat removal must be asserted with particularity, and supported by clear and convincing evidence." C. Wright, A. Miller & E. Miller, Federal Practice & Procedure, §3723, pp. 342, 343. See also Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 42 S. Ct. 35 (1921), stating that a sham or fraudulent joinder must "be shown by a petition for removal" and such allegations "must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions." 42 S. Ct. at 37; emphasis ours. The allegations of "fraudulent joinder may not rest upon 'epithets', but must be such as compels the conclusion that the joinder is without right and made in bad faith." See also, Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962), cert. denied, 376, U.S. 959, 84 S. Ct. 964; and Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1954).

Respondents claim to have asserted consists of nothing more than "epithets" and conclusory statements that the alien defendants had no contacts with the Texas forum and the in-state defendants had no connection with the tragedy. See removal papers at JA 1825–1835.[11]

With regard to the in-state defendants, Enserch and EH&G, Respondents admit that they are in-state but merely assert that "upon information and belief" they were not "involved in the design, construction or operation of the UCIL pesticide manufacturing and storage plant in Bhopal, India". JA 1831. Contrary to Respondents false claim that Petitioners "have not offered a single fact", Resp. Opp. Br. at 41, Petitioners did offer specific proof which established that Enserch and EB&G were involved with the Bhopal plant. See A-112, 113 (Laughlin affidavit) and JA 414, 415, 431 - 434 (Plaintiffs

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[11] The Respondents have admitted in their Opposition Brief that the "no possibility" rule applies to their "fraudulent joinder" contentions and thus they had upon them the burden to "prove that there is no possibility that the plaintiff will be able to establish a cause of action against the in-state (or alien) defendant(s) in state court." Resp. Opp. Br. at 33, quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984).

Rule 3(G) Statement in the District Court).[12]

With regard to the four alien defendants, again the Respondents' assertions were conclusory and, again, the Laughlin affidavit and Petitioners' Rule 3(G) Statement in the District Court thoroughly undercut them.[13]

Despite the fact that Petitioners were erroneously given no opportunity for discovery, the record before the Court still establishes that the Respondents did not satisfy their "no possibility" burden. To the best of our knowledge, it has been many years since the Court has granted certiorari specifically on the fraudulent joinder issue. We respectfully suggest that this case – where so many facets of the subject have been presented – is a propitious one for the Court's intervention, particularly in

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[12] Rule 3(g) of the Local Rules of the Southern District of New York states that "all material facts set forth in the statement [3(G)] ... will be deemed to be admitted unless controverted by the statement by the opposing party". And, as we noted in our Petition, the Court of Appeals in the first appeal discussed the Humphrey & Glasgow connection. 809 F.2d at 200.

[13] See Laughlin affidavit for a detailed statement of how UCC dominated UCIL and UCE, how UCC actually ran UCIL, particularly with regard to the Bhopal plant, and how UCC might be deemed the agent of UCIL and/or UCE for the purposes of jurisdiction and/or might be the alter ego of each other. A101-112 and see Plaintiffs Rule 3(G) Statement, JA 431, 432.

view of the importance of such principles as federalism, comity and removal/remand law.

III.
In Any Event, The Futility Exception Does Not Apply In This Case

The Respondents claim that there is no conflict with regard to the "futility exception". See pp. 42-46 of Resp. Opp. Br. As we noted in our Petition, we read International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700 (1991) ("International Primate") differently and contend that the Court left that question open, with large hints that 28 U.S.C. § 1447(c) might unconditionally require remand where the district court determines there is no standing in the federal court. See Pet. at pp 29-35.

But assuming arguendo such an exception exists, it is clear that it does not apply in this case. In the first place, while the question of standing in the federal court and the application of the act of state doctrine may be one of federal law, most assuredly the question of standing in the state courts is one of state law. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S. Ct. 431, 435

(1933).[14]

In the second place, it is clear that, under Texas law on standing, the Petitioners probably do have standing to litigate this case in the Texas state court.[15] The Texas rule on standing is defined in Rodgers v. RAB Investments, Inc., 816 S.W. 2d 543, 546 (Tex. App.-Dallas 1991, no writ);[16] and, as there defined, the standing requirements in Texas apparently are not susceptible to any parens patriae type of representation. Instead they focus upon "some interest peculiar to the person individually and not as a member of the general public". Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984). "(O)nly the person whose primary legal

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[14] See also, Moor v. Atchison, Topeka & Santa Fe, 699 F.2d 507, 511 (10th Cir. 1983); Owen of Ga., Inc. v. Shelby County, 648 F.2d 1084, 1088 (6th Cir. 1981).

[15] Most state courts will be more liberal about standing because the state courts' jurisdiction is not governed by Art. III of the U.S. Constitution. Dalworth Oil Co. Inc. v. Fina Oil & Chemical Co., 758 F. Supp. 410, 411 (N.D. Tex. 1991) (noting that "standing requirements in state court are often less stringent than those in federal court precisely because of Art. III").

[16] See also, City of Betts v. Greater Tex-homa Util. Author, 744 S.W.2d 636, 639 (Tex. Civ. App.-Dal. 1987, no writ); Billy B. Inc. v. Bd of Trustees, 747 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ); and Housing Authority v. State, 539 S.W.2d 911, 913-14 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).

right has been breached may seek redress for an injury". Berger v. Berger, 578 S.W.2d 547, 549 (Tex. App.—Houston [1st Dist.] 1979, no writ) (emphasis ours). And, as we have already pointed out, that person has the constitutional right to a lawyer of his or her own choice, and one who "does not have a conflict of interest". McCuin, 714 F.2d at 1263; see also, Davis, 650 F.2d at 480.[17]

In any event, "the futility doctrine" should, we respectfully submit, be clarified by this Court by way of certiorari.[18]

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[17] In addition, there is, of course, the "Open Courts Provision" of the Texas Constitution Art I, Sect. 13, which gives further impetus to the view that Texas Courts are more liberal about standing than the federal courts. See p. 32 of Pet. n. 35. One thing is certain: even if a futility exception exists, it does not apply if it is just "conceivable" that the state court would entertain the claim. Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, et al, 876 F.2d 1051, 1054 (1st Cir. 1989). Because of the broad view of standing in the state courts under Texas law, it is certainly "conceivable" that a Texas court would hold that the Petitioners would have standing in the Texas court.

[18] The Respondents inject inappropriate and wholly irrelevant comments as to whether Petitioner's present counsel has the right to represent the Petitioners. In the first place, the Respondents did not file a motion to show authority in the Court of Appeals, even though they certainly could have done so if they had really believed there was no such authority. Indeed, in their Brief before the Second Circuit they implicitly conceded that counsel did have such authority. See p. 8 of such Brief. In any event, the record in the court below definitely

IV.
Reply To Respondents' Assertions of Collateral Estoppel

At page 2 of Respondents' Brief, they state that "Petitioners have not disputed Union Carbide's contention below that they are the same Plaintiffs who were previously before the District Court." This is another outrageously untrue statement.

To be sure, the Respondents admitted in District Court that they could not, and did not, contend that all of the Bano Bi and Wahid Plaintiffs had been named in the 1985 action. See JA 6746. Even the statements that some of such plaintiffs had been named pales before the unequivocal statements of the Bano Bi Petitioners that "Bano Bi Plaintiffs were not specifically

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established that, with regard to the Bano Bi plaintiffs, Wayne Walker was employed (A 73 wherein Mr. Khan swears that "(a)s leader of the Bhopal Gas Peedit Mahilo Udyog Sangathan, I work (sic) with the Plaintiffs in Bano Bi to employ Mr. Walker and other American counsel") and that he, in turn, requested that present counsel handle the appeal. JA 6271. As to the Wahid Plaintiffs, it is not disputed that James P. Frantz is the authorized attorney for those plaintiffs and that he, in turn, also requested present counsel to handle the appeal on their behalf. JA 6270. Petitioners counsel will ignore the completely irrelevant references to his suspension made at p. 18, 19 of the Resp. Opp. Br., except to say that he sincerely believes he will be fully vindicated, including with regard to the suspension, in the case of Benton Musslewhite v. State Bar of Texas, No. 92-37727, 270th District Court, Harris County, Texas, which is presently pending.

listed as plaintiffs in the earlier (1985) action in this Court, or, if listed, such li ting was made without the knowledge and conse..t of the Bano Bi Plaintiffs". JA 364; A 72-74 (Kahn affidavit); A 123-125, 129 (Laughlin affidavit).

In any event, even if the Plaintiffs in this suit had been named in the first suit, the 1986 forum non conveniens dismissal by Judge Keenan was of course without prejudice and, as we noted in our Petition, the 1986 dismissal cannot collaterally estop the Petitioners with regard to issues not expressly decided or where the circumstances are different. Parklane Hosiery Co. v. Sharp, 439 U.S. 322, 99 S.Ct. 645 (1979). Thus, there can be no collateral estoppel with regard to the following: 1) the question of whether this case should be dismissed under the state of Texas forum non conveniens law (and its Open Forum Statute); 2) whether, at present, India is not an adequate alternative forum; and 3) whether the stipulations of the Petitioners in this case, the ceasing of operations of the plant in India and the other circumstances as they exist at this time, suggest that the American forum is not an inconvenient forum for the trial

of this case.[19]

CONCLUSION

Space limitations preclude us from addressing all of the insupportable statements made, and positions taken, by the Respondents. Though completely irrelevant to the issues in this Petition, we cannot refrain, however, from mentioning one of Respondents most frivolous contentions of all – that the Petitioners claims might be barred by limitations. In Petitioners Brief filed in the District Court, the myth of such a defense was fully obliterated. JA 110-131 and supporting affidavits of Khan, A 88 to 95,

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[19] See pp. A 113 - 128 of the Laughlin Affidavit and A 74 - 88, 95, 96 of Khan Affidavit and the account of the utter turmoil in India in the publications discussed under I, supra. See also, In Re Aircrash Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1166 (5th Cir. 1987) (en banc), vacated on other grounds sub nom, Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032, reinst. save as to dams under original nom, 883 F.2d 17 (5th Cir. 1989) (the circumstances at time of filing control the forum non conveniens determination); Chick Kam Choo, 486 U.S. 140, 148-49, 108 S. Ct. 1684, 1690-91 (holding that where, in a prior forum non conveniens decision of the federal court, the court did not address the question of dismissal under state forum non conveniens law, collateral estoppel or issue preclusion does not apply in a suit subsequently filed in state court); Parsons v. Chesapeake & Ohio Ry. Co., 375, U.S. 71, 84 S.Ct. 185 (1963) (holding that the forum non conveniens determination of the state court did not collaterally estop same suit subsequently filed in federal court).

and Laughlin, A 129 to 132.[20]

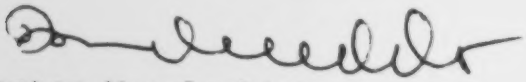
After all is said and done, what shines through the cloudy rhetoric of the Respondents' Opp. Br. most of all is the bright line of abuse of federal power by the courts below. Simply put, this case belongs in the state court of Texas. Considerations of federalism, comity and removal/remand law make the "fraudulent joinder" issues the most important ground for the grant of certiorari.

Petitioners pray the Court to grant such writ.

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[20] For example the 1988 Bhopal Act and the orders of the Indian Supreme Court staying proceedings tolled the statute of limitations. 50 Tex. Jur. 3d, Limitations of Action, § 125, p. 561; Doneghy v. State, 334 S.W.2d 506, 509 (Ct. of App. Amarillo, 1960, writ ref'd n.r.e.). Succeeding class actions have constituted a concatenate tolling of limitations. See Crown, Cork & Seal Co., Inc. v. Parker, 103 S.Ct. 2392 (1983). The actions of Respondents, in concert with UOI, create at least a fact issue under the Texas law as to equitable estoppel. Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983). Limitations was also tolled under the Texas "wrong-court" statute, TEX. CIV. PRAC. & REM. CODE § 16.064. See Griffin v. Big Spring Ind., 706 F.2d 645 (1st Cir. 1983), cert. denied, 464 U.S. 1008; Burford v. Sun Oil Co., 186 S.W.2d 306 (Tex. Civ. App. 1945, writ ref'd n.r.e.); and 50 Tex. Jur.3d, Limitations of Action § 50, pp. 607-608. And since many of the named Plaintiffs were minors, limitations as to their causes of action do not run until they are twenty years old. TEX. CIV. PRACT. & REM. CODE § 16.002.

Respectfully submitted,



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